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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE COUNTY OF DUPAGE, THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, THE VILLAGE OF LISLE, and THE VILLAGE OF WOODRIDGE,

Petitioners,

v.

LASALLE NATIONAL BANK OF CHICAGO, UNITY VENTURES, and WILLIAM ALTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court extend its decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) to require federal courts to apply federal claim preclusion/claim splitting principles where similar federal claims (here under 42 U.S.C. §1983) are presented sequentially in state and then federal courts and where there are no clearly discernible, dispositive state law claim preclusion rules available to determine whether the later filed federal case should be barred, pursuant to 28 U.S.C. §1738, by reason of the disposition of the state court case?

2. Did the Court of Appeals properly identify and apply Illinois claim preclusion law, as articulated by the Appellate Courts of Illinois and as previously interpreted by the Seventh Circuit Court of Appeals, in reversing the District Court's dismissal of this action on *res judicata* grounds?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 8, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 856 F.2d 925 and is at Appendix A to this Petition.[1] The memorandum opinion and order of the District Court, dismissing the First Amended Complaint, is at App. D. The judgment of the Court of Appeals is at App. B.

JURISDICTION

The judgment of the United States District Court for the Northern District of Illinois was entered July 31, 1987. A notice of appeal was timely filed September 16, 1987. The judgment of the United States Court of Appeals for the Seventh Circuit was entered September 8, 1988, and a timely petition for rehearing was denied October 24, 1988 (App. C). This Court has jurisdiction under 28 U.S.C. §1254(1).

[1] Hereinafter citations to "App." are to the Appendix to this Petition.

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., amend. XIV, §1 provides in relevant part:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 U.S.C. §1983, provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

28 U.S.C. §1738 provides as follows:

> The acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

The pertinent judicial antecedents of this case go back to 1979 when the Illinois Environmental Protection Agency ("IEPA") placed the sewage treatment plant in western DuPage County, Illinois on restricted status, barring additional hookups thereto. A developer with a valid IEPA permit (Corporate West Development, Inc.) commenced an action in the Circuit Court of DuPage County, seeking to enforce its permit and hook up its completed development to the sewage treatment plant. In August, 1980, that case was settled, and an order entered, whereby the County and the Villages of Lisle and Woodridge (the defendants herein) were given a small number of additional hookup rights, plus the ability to earn more depending on future plant performance. Those rights were allocated among the County and the Villages in the order, which was entered by the court on August 13, 1980.

Shortly thereafter, plaintiffs herein were given leave to intervene in that case, in which they sought to set aside the order to the extent it impaired their alleged rights, under an IEPA sewer construction permit issued to them on January 31, 1979, to develop part of their Hobson Greene property. Their original intervenors' complaint requested declaratory and injunctive relief only and was ultimately dismissed in April of 1984, as moot, when a new sewage treatment plant, having ample capacity to serve plaintiffs' needs, was opened in the County.

In October, 1982, plaintiffs had filed the instant action in federal court, alleging that the August 13, 1980 order, plus an earlier zoning dispute between the parties (dating

from 1972-74), and a boundary/annexation agreement between defendants Woodridge and Lisle, which plaintiffs claimed interfered with their ability to obtain water service for their project, all were part of a conspiracy in restraint of trade in violation of the Sherman Act. (App. E). Those claims were dismissed by the Seventh Circuit on state action immunity grounds. *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

Meanwhile in June, 1984, plaintiffs filed an amended complaint in state court, asserting four claims based on 42 U.S.C. §1983, alleging that the August 13, 1980 order, and the sewer hookup rights allocation agreement contained therein, violated their constitutional rights (under the fifth and fourteenth amendments to the U.S. Constitution) to procedural and substantive due process, equal protection, and against a taking of their property without just compensation, and claimed $20,000,000 in damages. (App. F). Those claims were finally adjudicated adversely to plaintiffs in the state courts, which held that any injury suffered by plaintiffs was "self-inflicted," not caused by defendants. (App. G).

While the state court §1983 complaint was still pending, in 1987, plaintiffs filed the instant First Amended Complaint ("Complaint") herein, also asserting four claims based on 42 U.S.C. 1983, alleging that the same activities and alleged conspiracy (zoning, water and sewer) on which they had previously based their antitrust claims herein constituted violations of their constitutional rights (procedural and substantive due process, equal protection, taking without just compensation), and claimed $20,000,000 in damages. (App. H). Except for the legal theory of recovery, the 1987 Complaint is virtually identical to the 1982 antitrust complaint filed herein. Except for the al-

legations relating to the zoning and water matters, the 1987 Complaint is virtually identical to the §1983 complaint filed in state court in 1984, including "carbon copy" prayers for relief.

The District Court thought enough was enough and dismissed the instant Complaint on *res judicata* grounds. (App. D). The Court of Appeals, after struggling unsuccessfully to find an applicable Illinois state law claim preclusion principle to sustain the District Court, reversed on the ground that defendants/movants had failed to carry their burden of persuasion, under Illinois law, on their motion to dismiss. (App. A).

REASONS FOR GRANTING THE WRIT

I.

IN ORDER TO GUIDE THE LOWER COURTS IN THE EFFECTIVE ADMINISTRATION OF JUSTICE AND TO PROTECT THEIR DOCKETS FROM NEEDLESS, REPETITIVE CASES, THIS COURT SHOULD EXPRESSLY EXTEND *MARRESE* BY RULING THAT, IN THE ABSENCE OF CLEARLY DISPOSITIVE STATE LAW CLAIM PRECLUSION PRINCIPLES, FEDERAL COURTS MUST APPLY FEDERAL PRECLUSION AND CLAIM-SPLITTING PRINCIPLES IN MULTIPLE STATE/FEDERAL LITIGATIONS INVOLVING FEDERAL CLAIMS, INCLUDING CLAIMS UNDER 42 U.S.C. §1983.

The Court of Appeals' decision, review of which is sought hereby, exemplifies the serious difficulty for the lower federal courts, and the federal judicial system generally, created by this Court's failure in *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373

(1985) to decide what *res judicata* principles should apply where the pertinent state law does not contain any clear answer to a claim preclusion issue. Are the federal courts to guess at the answer (or decide against movant where no clear state law answer appears, as was done here), or divine state law, as in a diversity case, or apply federal law, as persuasively advocated by Chief Justice Burger in his *Marrese* concurrence. 470 U.S. at 390.

As this Court doubtless recalls, the *Marrese* case came to the Court after the Seventh Circuit had applied federal law to preclude plaintiff's federal antitrust claims by reason of a previous decision by the Illinois courts on plaintiff's comparable state common law claims. Judge Posner had reasoned that, since the Illinois courts were not competent to hear federal antitrust claims, there could not be any applicable Illinois claim preclusion principle, and, therefore, the federal antitrust court ought to apply federal claim preclusion principles. This Court reversed, holding that 28 U.S.C. §1738 required federal courts to look to state law first in these circumstances, and remanded the case for the District Court to search Illinois law for the answer. Thereafter, the District Court found an applicable Illinois claim preclusion principle. However, this Court did not tell the lower courts what to do in the event no applicable state claim preclusion principle is discernible, precisely the guidance sought by this Petition.

Because of the concurrent federal and state court jurisdiction over claims arising under 42 U.S.C. §1983 (and the rapidly increasing number of those cases being filed), and the unlikelihood that dispositive state preclusion law will develop with respect to sequential §1983 claims, it is particularly important that this Court expressly direct federal courts to apply federal preclusion law with respect to sequential, federal law claims, especially those arising under

42 U.S.C. §1983, where no clearly applicable state law claim preclusion principles are discernible. Otherwise, based on the Court of Appeals' decision herein, litigants will be encouraged to split claims, and thereby duplicate proceedings in federal courts. Moreover, as a result of the ruling in this case, the federal courts will be inhibited from protecting themselves and their dockets from such redundant litigation by being required to look to unclear or nonexistent state law, and may decline to dismiss cases involving repetitive, abusive pleadings, like this case, because the defendant/movant is unable to point to a dispositive state law principle requiring preclusion. Federal law clearly precludes the claim-splitting which occurred here. The salutary purposes of these federal law principles should not be frustrated by an absence of clearly applicable state claim preclusion principles in cases such as this.

A. The Court Of Appeals Here Was Unable To Discern A Clearly Dispositive State Claim Preclusion Principle.

Petitioners have been unable to find, in Illinois or elsewhere, any sequential §1983 cases, either state-state, state-federal, federal-state, or federal-federal, which would be helpful in deciding cases like the instant one.[2] Not surprisingly then, the Seventh Circuit Court of Appeals was unable to find any clearly applicable Illinois state law preclusion principles with which to resolve this case. Moreover, no applicable cases have been decided by the Illinois Supreme Court and the Court of Appeals herein stated that they had "not found it easy to extract from often-

[2] *International Prisoners' Union v. Rizzo*, 356 F.Supp. 806 (E.D. Pa. 1973), is a sequential §1983, state-federal case, where the District Court barred the claims before it on *res judicata* and claim-splitting grounds, but it is unclear what law, state or federal, it was applying.

times conflicting language in the opinions of the Illinois Appellate Court sufficient guidance to permit [them] to fulfill [their] obligation under Section 1738." *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925, 930 (7th Cir. 1988) (App. A-11).

B. In The Absence Of Clearly Dispositive State Law, Federal Law Should Be Applied.

In *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), this Court reversed the Seventh Circuit's application of federal preclusion law, and remanded the case to the District Court to examine and apply the *res judicata* and related law of Illinois. However, as pointed out in Chief Justice Burger's concurrence, what the majority there failed to do was to instruct the District Court on what to do if the answer did not clearly appear in the state jurisprudence. 470 U.S. at 388.

On remand to the District Court in *Marrese*, Judge Plunkett (also the District Judge in the instant case) identified Illinois *res judicata* law which he found controlling therein, thus avoiding the problem described in Chief Justice Burger's concurrence. However, this case presents that problem squarely. The Seventh Circuit panel here stated that they had "not found it easy to extract from oftentimes conflicting language in the opinions of the Illinois Appellate Court sufficient guidance to permit [them] to fulfill [their] obligation under Section 1738." 856 F.2d at 930 (App. A-11). Having failed to find clear Illinois *res judicata* law, the panel decided Petitioners' Rule 12(b)(6) motion against them for failing to sustain their burden of persuasion. *Id.* at 934 (App. A-18).

However, as pointed out by Chief Justice Burger in *Marrese*, if there is no unambiguous state law answer to

a preclusion question, as here, ". . . the concerns of comity and federalism underlying §1738 do not come into play. . .," and, therefore, ". . . a federal rule would be more appropriate than a creative interpretation of ambiguous state law." *Marrese*, 470 U.S. at 390 (Burger, C. J., concurring).[3]

Here, the federal interest is even greater than in *Marrese* because the state court judgment related entirely to federal claims under 42 U.S.C. §1983.[4] While federal courts have an interest in ensuring that parties have an adequate opportunity to litigate their federal rights, federal courts also have "direct interests in ensuring that their resources are used efficiently and not as a means of harassing defendants with repetitive lawsuits." *Marrese*, 470 U.S. at 390.

The issue presented here was left open by *Marrese*, is an important, continuing one in light of concurrent federal/state jurisdiction and the increase in §1983 state and fed-

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[3] As Chief Justice Burger further explained in footnote 4, 470 U.S. at 390:

> "By contrast, when a federal court construes substantive rights and obligations under state law in the context of a diversity action, the federal interest is insignificant and the state's interest is much more direct than it is in the present situation, even if the relevant state law is ambiguous."

See also *Haring v. Prosise*, 462 U.S. 306, 314-15 n.8 (1983).

[4] Indeed, even the *Marrese* majority recognized that there were certain situations where the federal interest in providing a federal forum for certain federal claims would act as an exception to the requirements of 28 U.S.C. §1738, and a federal claim, which would otherwise be barred by state law, would be permitted to proceed in federal court. 470 U.S. at 383. The federal interest in barring federal claims already litigated in state court, in the absence of any applicable state law preclusion principle, ought similarly to occasion the application of federal law without threatening in any way the federalism balance struck by 28 U.S.C. §1738.

eral court litigation, and ought to be resolved in favor of requiring federal courts to apply a uniform, federal rule where no clearly dispositive state preclusion law exists, which rule would be a clear bar to the claim-splitting which occurred in the instant action.

C. Federal Claim Preclusion And Claim-Splitting Principles Would Bar This Action.

The applicable federal preclusion rule was defined by Chief Justice Burger in *Marrese, i.e.*, ". . . that a party is precluded from asserting a claim that he had a 'full and fair opportunity' to litigate in a prior action. . ." *Marrese*, 470 U.S. at 390.[5] Such a rule obviously would result in imposition of the bar herein, as decided by the District Court, which characterized this abusive pleading case as follows:

> This suit is a prime example of a dispute that deserves application of the *res judicata* doctrine. The dispute between the parties has raged for far too long—a definitive resolution should have been achieved long ago. This suit has been before the United States Supreme Court, the Illinois Supreme Court, the Court of Appeals for the Seventh Circuit twice, the Illinois Appellate Court at least four times, the District Court for the Northern District of Illinois at least three times, and before various circuit courts and administrative tribunals of the State of Illinois more times than we can count. The failure to raise a conspiracy claim at any time during the continuing litigation in the Illinois courts despite repeated opportunities to do so bars this present action. (App. D-9-10).

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[5] This rule is consistent with Judge Posner's analysis of federal claim preclusion law in the Seventh Circuit's decision in *Marrese*, which was reversed by this Court on the sole ground that, at least in the first instance, federal courts are required by 28 U.S.C. §1738 to apply state law claim preclusion principles, to the extent they exist. *Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150 (7th Cir. 1984).

Plaintiffs here had knowledge of all of the facts prior to filing their initial action in federal court in 1982; therefore, their failure to raise all matters at that time requires that the present action be barred. "[I]f the claimant, before filing its first suit, is in possession of all the facts on which its second suit is based, the splitting of the claims into multiple suits is fatal to maintenance of the later filed action." *Alyeska Pipeline Service Co. v. U.S.*, 688 F.2d 765, 769 (Ct. Cl. 1982), *citing Everett Plywood Corp. v. U.S.*, 512 F.2d 1082, 1087 (Ct. Cl. 1975).

Federal law requires that once an injury has occurred, all claims resulting therefrom must be brought in one suit or lost. *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986), *cited in Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1365 (7th Cir. 1988). Accordingly, there is absolutely no justification for plaintiffs' attempts here to reprise claims previously known to them, and which clearly could have been, but intentionally were not, pleaded in a prior state court action. The law against this practice is clear:

> [T]he federal definition of a cause of action, when combined with the rule against claim-splitting, requires that a plaintiff allege in one proceeding all claims for relief arising out of a single core of operative facts, or be precluded from pursuing those claims in the future.

Shaver, 840 F.2d at 1365. The fact that plaintiffs chose to allege fewer facts in their state court case in 1984 than they did herein, both in 1982 and 1987, does not prevent the instant action from being barred.

The federal rule against claim-splitting was designed to protect a defendant from being harassed by repetitive actions based on the same facts and claims and, further, to promote judicial economy and convenience. *Alyeska Pipeline Service Co. v. U.S.*, 688 F.2d 765, 771 (Ct. Cl.

1982). Neither purpose would be promoted here if plaintiffs were permitted to proceed with this action.

II.

BARRING PLAINTIFFS' CLAIMS HERE WOULD NOT CONFLICT WITH APPLICABLE ILLINOIS CLAIM PRECLUSION AND CLAIM-SPLITTING PRINCIPLES.

Plaintiffs filed this case on October 26, 1982, alleging that defendants had conspired to prevent them from developing their DuPage County real estate, including its zoning (1972-74), water (1978) and sewer (1980) components, in violation of the Sherman Act. (App. E). On June 11, 1984, the same plaintiffs filed an amended complaint (App. F) in the DuPage County Circuit Court in a case which had been pending since 1980, alleging that these same defendants had prevented them from developing the same DuPage County real estate, including only the sewer component allegations, in violation of the U.S. and Illinois Constitutions and 42 U.S.C. §1983, which case has since proceeded to final judgment in favor of defendants (App. G). On April 3, 1987, the same plaintiffs amended their complaint herein, alleging the *same* conspiracy as in their original antitrust complaint, filed herein in 1982, *i.e.*, that the same defendants had conspired to prevent them from developing the same real estate, through actions with respect to zoning, water service, and sewer service, all now alleged to be in violation of the Illinois and U.S. Constitutions and 42 U.S.C. §1983. (App. H).[6]

Examining only the law of the State of Illinois, the Court of Appeals concluded herein that "the current ac-

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[6] Any doubt about whether the Complaint should be barred, under any *res judicata* and claims-splitting principles, can be quickly dispelled by merely reading the three complaints (App. E, F and H) together.

tion does not involve the same cause of action as the previous state court suit," and, therefore, held that the instant Complaint herein was not barred by the final judgment in the state court suit. *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925, 934 (7th Cir. 1988) (App. A-18). In fact, Illinois law required quite a different result. *Hagee v. City of Evanston*, 729 F.2d 510 (7th Cir. 1984); *Hughey v. Industrial Commission*, 76 Ill. 2d 577, 394 N.E.2d 1164 (1979). As the Court of Appeals herein correctly found, the doctrine of *res judicata* bars a second suit only when it is the "same" as or "closely related" to the first suit. *Hagee*, 729 F.2d at 513. But, as Judge Flaum of that same court had previously noted:

> [t]he principle that *res judicata* extends to all matters within the purview of the original action, whether or not they were actually raised, is tantamount to a rule requiring parties to consolidate all closely related matters into one suit. As such, the principle serves well the interest of judicial economy, and thus it is at the core of the *res judicata* doctrine.

Id. at 514. In deciding the present case, the Court of Appeals purported to rely on Judge Flaum's analysis in *Hagee*, but failed to heed Judge Flaum's cautionary note that the federal courts must be wary of contrived pleadings which seek to avoid application of the bar. As a result, the Court of Appeals effectively wrote out of Illinois *res judicata* law the could have/should have pleaded standard clearly identified by Judge Flaum in *Hagee* as the only feature of *res judicata* which distinguishes it from collateral estoppel. *Hagee v. City of Evanston*, 729 F.2d 510, 514 n.8 (7th Cir. 1984).

This is not a case in which plaintiffs assert facts of which they had no knowledge at the time their prior state court case was filed. Instead, plaintiffs herein made a strategic decision in 1984 not to assert in their amended

complaint in state court all of the factual allegations which relate to their purported 42 U.S.C. §1983 claims. Plaintiffs conceded in their briefs in the Court of Appeals that they learned in 1982 of the whole of defendants' alleged conspiracy to prevent them from developing the real estate in question (including the zoning, water and sewer components thereof). They then commenced their improper claim-splitting activities by alleging everything herein in 1982, only substantial parts thereof in state court in 1984, and back to everything in the instant Complaint.

That kind of "creative" pleading is claim-splitting and is not tolerated under Illinois law. *Torres v. Rebarchak*, 814 F.2d 1219, 1224 (7th Cir. 1987). In that case, the Seventh Circuit stated that "Illinois, like most states, does not permit a plaintiff to sue for part of a claim in one action and then sue for the remainder in another." *Id.*, *citing Radosta v. Chrysler Corp.*, 110 Ill. App. 3d 1066, 443 N.E.2d 670 (1st Dist. 1982); *Wilson-Jump Co. v. McCarthy-Hundrieser & Assoc.*, 85 Ill. App. 3d 179, 405 N.E.2d 1322 (1st Dist. 1980); *Baird & Warner, Inc. v. Addison Industrial Park, Inc.*, 70 Ill. App. 3d 59, 387 N.E.2d 831 (1st Dist. 1979). This anti-claim-splitting doctrine is related to the doctrine of *res judicata*, but applies specifically where the plaintiff, as here, files multiple lawsuits seeking recovery for the same alleged injury. *Torres*, 814 F.2d at 1224.

The law in Illinois is well-settled that a plaintiff must allege, in a single action, every ground for relief that he has against a defendant's conduct, or he will be splitting his claims and thus be barred from subsequent actions. *See Wozniak v. DuPage County*, 845 F.2d 677 (7th Cir. 1988); *Button v. Harden*, 814 F.2d 382 (7th Cir. 1987); *Car Carrier, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986). In *Button*, for example, the plaintiff, a tenured public school teacher, was fired, and, after an evidentiary

hearing, the dismissal was held warranted. Plaintiff appealed that decision to an Illinois circuit court, which affirmed the dismissal. Plaintiff next filed suit under 42 U.S.C. §1983, alleging that he was fired in retaliation for exercising his first amendment rights. The Federal District Court held that plaintiff's federal claim was barred by his failure to raise that ground for relief in the prior action. *Button*, 814 F.2d at 384. The court would not allow the plaintiff in *Button*, as plaintiffs here are seeking to do, to split his claim for a single injury by bringing more than one action.

Barring these claims is also consistent with other applicable Illinois claim preclusion principles. First, Illinois courts have long held that "[i]t is a fundamental principle of procedure that in law and equity a party must set out in his pleadings all of the grounds for recovery he may have." *Morris v. Union Oil Co.*, 96 Ill. App. 3d 148, 154, 421 N.E.2d 278, 283 (5th Dist. 1981). Second, Illinois courts have held that a plaintiff may not harass defendants with multiple, piecemeal litigation "when one suit in the proper court would have been all the litigation necessary." *Lucas v. LeCompte*, 42 Ill. 303 (1866). Third, all that a plaintiff is entitled to under Illinois law is a "full and fair opportunity to litigate his claim." *Benton v. Smith*, 157 Ill. App. 3d 847, 510 N.E.2d 952 (1st Dist. 1987); *Hagee*, 729 F.2d at 515 n.9. If that opportunity is available, but plaintiff fails to exercise due diligence to assert all of his claims in that forum, plaintiff cannot later complain that his claims should not be barred. *Id.*; *Hughey v. Industrial Commission*, 76 Ill. 2d at 582.

Somewhere, in its effort to plumb the depths of Illinois *res judicata* law, the Court of Appeals lost sight of the grave pleading abuses found here. This is not a case where plaintiffs knew only about the "sewer conspiracy" in 1984, when they filed their 42 U.S.C. §1983 claims in state

court, and discovered the rest later. This case, purely and simply, involves plaintiffs who had knowledge of the factual bases for all three aspects of the instant 1987 Complaint as far back as 1982, had alleged them all herein in 1982, elected to allege only part of them in state court in 1984, and having lost there (and here originally), now go back to their original full scale conspiracy allegations in the instant Complaint, which they contend are sufficiently different from their state court complaint to prevent its final disposition against them from acting as a bar here. The Court of Appeals' holding, permitting such pleading abuses, will invite plaintiffs to split claims, shop forums and harass defendants with duplicative litigation. Such precedent is neither desirable under, nor required by, Illinois or federal law.

CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit, reversing the District Court's dismissal of this §1983 Complaint on *res judicata* grounds, highlights the need for this Court to give the guidance to the lower federal courts, not provided in *Marrese*, in addressing asserted claim preclusion with respect to federal claims (here under §1983) by reason of a prior, similar, state court judgment (here also under §1983), where no clearly dispositive state law claim preclusion principle is discernible. Such guidance is essential if lower courts are adequately to manage their dockets by eliminating cases where plaintiffs have already had an opportunity to assert their federal claims in prior state court proceedings. Petitioners respectfully urge the Court to issue the requested writ

for the purposes of (1) directing federal courts to apply federal law in the circumstances described hereinabove, and (2) reversing the Court of Appeals' decision herein, as clearly required by federal and state law.

Respectfully submitted,

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Dated: January 20, 1989

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 87-2497

LaSalle National Bank of Chicago, as Trustee under Trusts Numbered 40244, 53645, 100385 and 100386, Unity Ventures, and William Alter,

Plaintiffs-Appellants,

v.

The County of DuPage, a body politic, The Board of Commissioners of DuPage County, a body politic, The Village of Lisle, a municipal corporation, and The Village of Woodridge, a municipal corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 6517—**Paul E. Plunkett,** *Judge.*

Argued March 30, 1988—Decided September 8, 1988

Before Cudahy, Ripple, and Manion, *Circuit Judges.*

Ripple, *Circuit Judge.* The plaintiffs are owners and developers of a 145-acre parcel of real estate located in DuPage County, Illinois between the Villages of Lisle and Woodridge. They brought the present action under 42

U.S.C. § 1983, in which they allege that the defendants wrongfully violated their constitutional right to make reasonable use of their property. The plaintiffs claim that the defendants have violated the equal protection, due process, and taking clauses of the fifth and fourteenth amendments. The district court dismissed the plaintiffs' claims under the doctrine of res judicata. We reverse.

I

Background

A. *Facts*

This lawsuit has been through a long and tortuous litigation history, and its facts are complicated. Fortunately, those facts have been set forth already in an earlier appeal in this court. *See LaSalle Nat'l Bank v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986). We borrow heavily from that rendition.

In 1969, the plaintiffs purchased a 145-acre parcel of unincorporated land in DuPage County near Chicago with the intention of developing the area for luxury housing and related commercial businesses. The 145-acre development is known as "Hobson Greene" and lies within a largely unincorporated 1,500-acre tract known as the "Greene Area." The defendant DuPage County (the County), through the defendant Board of Commissioners, governs the unincorporated portions of DuPage County including the area containing Hobson Greene. The other defendants, the Villages of Lisle and Woodridge (Lisle and Woodridge, or, collectively, the Villages), are located within DuPage County on the eastern boundary of the Greene Area.

The plaintiffs allege that the defendants have engaged in a continuing conspiracy over a fifteen-year period to deprive them wrongfully of their right to make reasonable use of their property. Their complaint initially alleged violations of the antitrust laws. In their amended complaint, the operative pleading at this stage of the litigation, they allege that the defendants have violated the equal protection, due process, and taking clauses of the

fifth and fourteenth amendments. The plaintiffs allege that the conspiracy involved overt acts in three areas: zoning, water and annexation, and sewage.

Zoning: In 1970, the plaintiffs petitioned the DuPage County Zoning Board of Appeals for a special use permit that would have allowed them to proceed with the development of Hobson Greene. After conducting a public hearing, the Zoning Board of Appeals recommended that the Board of Commissioners deny the petition for the special use permit. On December 24, 1974, the Board of Commissioners adopted the recommendation of the Zoning Board of Appeals to deny the petition. The plaintiffs appealed the denial and an Illinois appeals court ultimately reversed the decision of the Board of Commissioners. The court found that the action of the Board of Commissioners had "little or no relation to the public health, safety and welfare of DuPage County." *LaSalle Nat'l Bank v. County of DuPage*, 369 N.E.2d 505, 512 (Ill. App. Ct. 1977). The plaintiffs allege that "[t]he initial denial of the necessary special use permit and the consequent delay in obtaining the permit were occasioned by the conspiracy among the County, Woodridge, and Lisle." Appellants' Br. at 9.

Water and Annexation: In 1978, the Villages entered into an agreement to divide the unincorporated land lying between their borders for purposes of annexation and the provision of water service. The plaintiffs approached Woodridge about providing water service to the Hobson Greene development. Woodridge conditioned the provision of water service on the plaintiffs' acceptance of Woodridge's annexation of the Hobson Greene development. The plaintiffs, not satisfied with the terms of Woodridge's offer, approached Lisle about water service. Since Hobson Greene lies beyond Lisle's exclusive territory, Lisle refused to deal with the plaintiffs. The plaintiffs allege that "[t]he purpose and effect of this division of territory was to give Woodridge the power to extract whatever demands it desired from any developer in its 'territory' who needed water service," and that, "[a]s a result of defendants' refusal to provide water service to Hobson Greene, plain-

tiffs were forced to rely on well water." Appellants' Br. at 10. Because the plaintiffs had to resort to well water, they were required to split their development into three phases.

Sewage: In or about 1971, the County and the Villages decided to consolidate the ownership and management of their various sewage treatment facilities. To this end, the County purchased the sewage treatment facilities of each of the Villages and agreed to provide sewage treatment service to the Villages. Among the provisions in the sales agreements was one reserving for the Villages the right to determine which users outside the Villages would receive sewage treatment service from the sewage treatment plant the Villages were selling to the County. The agreements also specified that, in the event new sewage treatment connections had to be rationed, the Villages would each have a right of first refusal to a certain number of connections.

The plaintiffs needed sewer permits from the Illinois Environmental Protection Agency (IEPA) and the County to construct sewer lines and to connect them to a sewage treatment plant. The plaintiffs received the necessary connection permits from the IEPA for Phase One and Phase Two of Hobson Greene on February 8, 1979 and January 31, 1979, respectively. Each permit was valid for two years, which meant that the plaintiffs could preserve their rights by laying sewer pipe any time before early 1981.

In 1979, the contingency contemplated in the sales agreements between the County and the Villages occurred when the IEPA determined that the consolidated DuPage County sewage treatment plant was overburdened. The IEPA sought to place a freeze on all further connections to the sewage treatment system until capacity was increased. At this point, another developer in the County, Corporate West, brought suit in the Circuit Court of DuPage County against the IEPA, the County, Lisle, and Woodridge. In this suit, Corporate West sought a declaration that it could connect its development to the Lisle-Woodridge plant regardless of the IEPA's action placing the plant on re-

stricted status. The IEPA then filed a cross-claim against the County, Lisle, and Woodridge in which it sought to enjoin them from issuing further building or connection permits. Corporate West ultimately was allowed to connect its development to the plant and was dismissed from the suit.

The IEPA then negotiated a settlement of its cross-claim with the other defendants under which it agreed to allow a limited number of new connections if the County would take certain steps to upgrade its treatment facility. The County and Villages agreed on a formula for dividing additional connections according to the following percentages: thirty-eight percent to Lisle, thirty-four percent to Woodridge, and twenty-eight percent to unincorporated portions of DuPage County. The agreement was subsequently embodied in a state circuit court decree, *Corporate West Development, Inc. v. Illinois Environmental Protection Agency*, No. 79 MR 257 (Cir. Ct. DuPage County Aug. 13, 1980) (*Corporate West*). The plaintiffs were not given notice or an opportunity to be heard prior to entry of the *Corporate West* decree even though they had preexisting valid permits from the IEPA. The twenty-eight percent allotted to the County for unincorporated areas was not sufficient to meet the needs of the Hobson Greene development. Consequently, the plaintiffs sought and were granted leave to intervene in the *Corporate West* suit. Their original intervention petition sought only injunctive relief and ultimately was mooted by the construction of a new sewage treatment plant with sufficient capacity to treat all the sewage generated by Hobson Greene. The state trial court's dismissal of that original petition, however, was without prejudice, and the plaintiffs subsequently filed an amended intervenor complaint asserting a section 1983 claim for damages arising out of the sewage controversy. The state court dismissed the amended intervenor complaint because it determined that the plaintiffs had not been injured by any of the defendants' actions. At issue in this case is whether the state court's judgment dismissing the plaintiffs' amended inter-

venor complaint in the *Corporate West* suit bars the present suit under the doctrine of res judicata.

B. *Procedural History*

1. The Illinois state court action

The *Corporate West* case was filed on May 31, 1979 in the circuit court in DuPage County. The plaintiffs moved to intervene on October 10, 1980 and fully participated thereafter. The purpose of the plaintiffs' intervention was to challenge the court's August 13, 1980 order, which allocated additional sewer capacity among the defendants, as a violation of the plaintiffs' rights to their IEPA sewer permits. The factual basis for the *Corporate West* complaint was limited to the defendants' alleged denial of sewage hookups and the events surrounding the entry of the *Corporate West* decree. Events concerning zoning and water and annexation were not at issue in that suit.

The plaintiffs' original intervenor complaint was dismissed as moot on May 13, 1984 with leave to amend. On June 11, 1984, the plaintiffs filed an amended intervenor complaint that sought damages for alleged violations of the due process, equal protection, and taking clauses of the fifth and fourteenth amendments. The defendants filed several motions to dismiss the amended intervenor complaint. The state trial court granted the defendants' third motion to dismiss. In an opinion by Judge Peccarelli, issued on December 16, 1986, the trial court found that:

> 5. [The plaintiffs were] never prohibited from exercising [their] rights, under the 1979 permit, to construct and connect [their] sewer line to the Lisle and Woodridge Plant by the August 13, 1980 Order of this Court or otherwise. During the existence of the permit, [the plaintiffs] never obtained a judicial or administrative judgment as to the status of the 1979 permit, nor constructed and attempted to connect [their] sanitary system to the Lisle and Woodridge Plant.

> 6. [The plaintiffs were] never injured in fact in [their] rights under the 1979 permit because [they were] never actually refused the right to connect. In fact, during the existence of the permit, the structural work necessary to connect with the Lisle and Woodridge Plant, and permitted by [their] permit, had not even been started by [the plaintiffs].
>
> 7. [The plaintiffs'] 1979 permit expired on its own terms on January 31, 1981, extinguishing [their] rights thereunder.
>
> 8. For the foregoing reasons, [the plaintiffs were] never injured in fact; no justiciable issue is presented herein; [the plaintiffs have] no standing to bring this action.

Corporate West Dev., Inc. v. Illinois Envtl. Protection Agency, No. 79 MR 257 (Cir. Ct. DuPage County Dec. 16, 1986); Appellees' Supp. App. at 277-78.

On December 11, 1987, the Appellate Court of Illinois affirmed the circuit court's dismissal of the amended intervenor complaint. *See Corporate West Dev., Inc. v. Illinois Envtl. Protection Agency*, No. 79 MR 257 (Ill. App. Ct. Dec. 11, 1987); Appellees' Br. at Ex. A. The court found that the plaintiffs did not have standing because they had failed to show that they had sustained, or were immediately in danger of sustaining, some direct injury as a result of the challenged conduct.[1] The court reasoned that (1) the plaintiffs had no intention of constructing the on-site interceptors prior to the expiration of their IEPA permits; and (2) even if the plaintiffs had been able to construct the on-site interceptors within the time remaining on their IEPA permits, they had no intention of seeking the connection permits that they claimed they were denied. Moreover, the court found that the plaintiffs never sought, and therefore were never refused, the building and connection permits that they alleged they were denied. *Id.* at 15-16.

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[1] *See infra* note 4.

2. The present suit

The plaintiffs filed the initial complaint in this suit on October 26, 1982, in which they alleged violations of the antitrust laws. The district court denied the defendants' motion to dismiss, but, on interlocutory appeal, this court dismissed the antitrust complaint under the state action exemption of *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. *See LaSalle Nat'l Bank v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985). The Supreme Court denied certiorari. 476 U.S. 1170 (1986). On remand, the plaintiffs sought leave to amend their complaint. The district court denied this motion. The plaintiffs appealed and, on September 19, 1986, this court remanded the case to the district court with directions to consider the plaintiffs' motion to file an amended complaint. R.101 at Ex. C. On April 1, 1987, the district court granted the plaintiffs' motion to file an amended complaint under section 1983 alleging constitutional violations. On July 31, 1987, however, the district court dismissed the plaintiffs' amended complaint under the doctrine of res judicata. The plaintiffs filed a timely notice of appeal.

C. *Opinion of the District Court*

The district court held that the present suit was barred by the doctrine of res judicata. Applying Illinois law, the court explained that a final judgment on the merits rendered by a court of competent jurisdiction bars the same parties or their privies from relitigating issues that were raised or could have been raised in the prior action. *LaSalle Nat'l Bank v. County of DuPage*, No. 82 C 6517, mem. op. (N.D. Ill. July 31, 1987); R.128. The district court accepted arguendo the plaintiffs' contention that the present lawsuit is different from the *Corporate West* action or any other state proceeding involving the same parties. Nevertheless, the court held that res judicata bars not only claims that were presented previously, but also claims that should have been presented in an earlier action but were not. The court concluded that the plaintiffs have had multiple opportunities to allege the whole con-

spiracy claimed in this suit, the most recent opportunity being in their amended intervenor complaint in the *Corporate West* proceeding. The court stated:

> Plaintiffs were aware of a potential section 1983 claim because they alleged such a claim in the amended intervenor complaint. In that complaint, Plaintiffs had to raise every ground for obtaining damages based on civil rights violations, else be open to a charge of splitting their cause of action.

Id. at 10.

The district court also held that the state court judgment was a final judgment on the merits, contrary to the plaintiffs' assertion that the state court merely decided that the plaintiffs lacked standing in that suit. As the district court explained:

> Here, it is clear that Judge Peccarelli's dismissal was "on the merits." He stated that Plaintiffs suffered no injury in fact; and any real injury was self-inflicted. He did use the word "standing," but not in the context urged by Plaintiffs. Judge Peccarelli correctly ruled that only an injured party may bring suit. He held that Plaintiffs had not been injured by Defendants; he did not hold that someone *had* been injured but that this Plaintiff technically was the wrong party to sue.

Id. at 11-12 (emphasis in original).

In sum, the district court held that the failure to raise a conspiracy claim at any time during the litigation in the Illinois courts, despite repeated opportunities to do so, bars the present action.

II

Analysis

A. *Res Judicata—Fundamental Principles*

We must decide whether, under the doctrine of res judicata,[2] this federal action, based on 42 U.S.C. § 1983, is barred by the previous action in the state court, also premised, at least in part,[3] on 42 U.S.C. § 1983. The basic principles governing our inquiry have been set forth recently by Judge Cudahy in *Torres v. Rebarchak*, 814 F.2d 1219, 1222 (7th Cir. 1987), and therefore can be restated quite briefly here. Section 1738 of title 28 commands that a federal court give the judgments of a state court "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . ." 28 U.S.C. § 1738; *see Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982); *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Consequently, a "state judgment must be given the same *res judicata* effect in federal court that it would be given in the court of the rendering state." *Torres*, 814 F.2d at 1222.

Whether the plaintiffs' claims in this action are barred, therefore, turns upon the preclusive effect of the earlier state judgment under the law of Illinois. This court has had several occasions during its recent terms to refer to

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[2] The term res judicata in this opinion is used to refer to claim preclusion, "i.e., the preclusive effect of a judgment in foreclosing litigation of matters that were or could have been raised in an earlier suit." *Kirk v. Board of Educ.*, 811 F.2d 347, 351 n.7 (7th Cir. 1987). This concept is to be distinguished from collateral estoppel, or issue preclusion, "which refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the intial action." *Id.*

[3] The plaintiffs' complaint in state court also stated claims based upon the Constitution of Illinois.

the Illinois law of res judicata. *See, e.g., Wozniak v. County of DuPage*, 845 F.2d 677 (7th Cir. 1988); *Torres*, 814 F.2d at 1222; *Kirk v. Board of Educ.*, 811 F.2d 347 (7th Cir. 1987); *Frier v. City of Vandalia*, 770 F.2d 699 (7th Cir. 1985); *Hagee v. City of Evanston*, 729 F.2d 510 (7th Cir. 1984). A reading of these cases makes it quite evident that we have not found it easy to extract from the oftentimes conflicting language in the opinions of the Illinois Appellate Court sufficient guidance to permit us to fulfill our obligation under section 1738. In *Torres*, however, we set forth those threshold principles that are settled. 814 F.2d at 1222. We now set them forth again in order to identify the area where ambiguity still exists:

1) Under Illinois law of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction bars the same parties or privies from relitigating matters that were raised or could have been raised in the prior action. *Id.*; *see also Wozniak*, 845 F.2d at 680.

2) As a general proposition (we shall treat this point with more precision later in the opinion) a final judgment on the merits not only settles issues that actually were litigated in the prior action but also issues that might have been raised in the prior action. *Torres*, 814 F.2d at 1222.

3) The party asserting the defense of res judicata has the burden of showing with clarity and certainty what was determined by the prior judgment. Any doubt as to what was decided in the earlier action must be resolved against an application of res judicata. *Id.*

4) The essential elements of res judicata are (1) an identity of parties or their privies; (2) an identity of causes of action in the earlier and in the later suit; and (3) a final judgment on the merits in the earlier suit. *Id.*

Most of the ambiguity surrounding the Illinois law of res judicata involves the second of these elements—the identity of causes of action. That element is also at the

center of the controversy between the parties in this case.[4] We now turn to an examination of that question.

B. *The Same Cause of Action Under Illinois Law*

In his exhaustive and scholarly treatment of this issue for the court in *Hagee*, Judge Flaum summarized the state of Illinois law as follows:

> The Illinois intermediate appellate courts have produced a wealth of cases on the question of what constitutes a cause of action, but they have not spoken with one voice. Our review of Illinois case law reveals many different formulations of the test to determine whether two suits involve the same cause of action, with no clear trend in any direction. However, despite differences in language, virtually all of these cases can be placed in one of two basic groups.
>
> In the first group of cases, the courts have approached the task of deciding whether two suits involve the same cause of action by looking at the proof required in each suit. This "proof" approach has been stated in numerous ways. For example, one oft-cited standard is whether the same evidence would sustain both actions.
>
> In the other group of Illinois cases dealing with the res judicata doctrine, the courts have taken a "transactional" approach to identifying a cause of action. A court employing a transactional approach will focus not on the type of proof required in each suit, but

[4] The plaintiffs have also argued that the state trial court's dismissal of their amended intervenor complaint in the *Corporate West* suit did not constitute a judgment on the merits because the court based its dismissal on the plaintiffs' lack of standing. Because we hold that the state court suit and the present suit are not based on the "same cause of action," and therefore that the doctrine of res judicata does not apply to bar the present suit, we need not address the plaintiffs' argument with respect to whether the state court dismissal was "on the merits."

> on the factual setting in which each suit arises. If both suits arise from the same transaction, incident or factual situation, res judicata generally will bar the second suit. In *Baird & Warner, Inc. v. Addison Industrial Park, Inc.*, 70 Ill.App.3d 59, 64, 26 Ill.Dec. 1, 8, 387 N.E.2d 831, 838 (1979), the court explained the transactional approach. It stated, "The mere fact that different claims are alleged is immaterial; the assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief."

729 F.2d at 512-13 (footnotes and citations omitted).[5] Since the Illinois Supreme Court had not expressed explicitly

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[5] Judge Flaum admitted that these two general categorizations were subject to significant variations. With respect to the "proof" approach, he wrote:

> Other Illinois courts have held the test to be whether the evidence needed to sustain the second action would have sustained the first. *See, e.g., Schmitt v. Woods*, 73 Ill.App.3d 498, 500, 29 Ill.Dec. 498, 499, 392 N.E.2d 55, 56 (1979); *Pierog v. H.F. Karl Contractors, Inc.*, 39 Ill.App.3d 1057, 1061, 351 N.E. 2d 249, 252 (1976). One court has framed the cause of action question as whether "every fact necessary for the [first] action is necessary to the cause at bar." *Cranwill v. Donahue*, 99 Ill.App.3d 968, 971, 55 Ill.Dec. 362, 364, 426 N.E.2d 337, 339 (1981). Most of the remaining cases in this group state not one test for determining what is a cause of action, but two. *See, e.g., Village of Northbrook v. County of Cook*, 88 Ill.App. 3d 745, 750, 43 Ill. Dec. 792, 796, 410 N.E.2d 925, 929 (1980) (test is "whether the evidence needed to sustain the second would have sustained the first or whether there is identity of facts essential to the maintenance of both cases"); *Palya v. Palya*, 87 Ill.App.3d 472, 475, 42 Ill.Dec. 638, 641, 409 N.E. 2d 133, 136 (1980) (test is "whether there is identity of facts essential to the maintenance of both cases or whether the same evidence would sustain both actions").

Hagee, 729 F.2d at 513 n.4. With respect to the "transactional" approach, he wrote:

> Other Illinois courts have also adopted a transactional approach in determining whether two suits involve the same

(Footnote continued on following page)

a preference for either of these approaches, Judge Flaum turned to that court's "most recent pronouncements . . . with regard to the policies behind the res judicata doctrine and the scope of that doctrine . . . ." *Id.* at 513.[6] The Illinois court had identified, he found, several policies that were fostered by the doctrine of res judicata:

> The res judicata doctrine has developed because of "the practical necessity that there be an end to litigation and that controversies once decided on the merits shall remain in repose." *Hughey v. Industrial Commission*, 76 Ill.2d 577, 582, 31 Ill.Dec. 787, 789, 394 N.E.2d 1164, 1166 (1979). Stated differently, res judicata is designed "to enhance judicial economy by prohibiting repetitive litigation." *Spiller v. Continental Tube*, 95 Ill.2d 423, 432, 69 Ill.Dec. 399, 403, 447 N.E.2d 834, 838 (1983) (citations omitted). The res judicata doctrine is also designed to protect litigants from the burden of repetitive litigation. *Id.* On the basis of these policy considerations, the Illinois Supreme Court has summarized the scope of the res judicata doctrine as follows:

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[5] *continued*

cause of action, looking at the "operative facts" or "underlying facts" of each suit. *See Radosta v. Chrysler Corp.*, 110 Ill.App.3d 1066, 1069, 66 Ill.Dec. 744, 747, 443 N.E.2d 670, 673 (1982); *Wilson-Jump Co. v. McCarthy-Hundrieser and Associates, Inc.*, 85 Ill.App.3d 179, 184, 40 Ill.Dec. 230, 234, 405 N.E. 2d 1322, 1326 (1980); *Power Electric Contractors, Inc. v. Maywood-Proviso State Bank*, 60 Ill.App.3d 685, 691, 17 Ill.Dec. 952, 956, 377 N.E.2d 142, 146 (1978). *See also Morris v. Union Oil Co.*, 96 Ill.App.3d 148, 157, 51 Ill.Dec. 770, 777, 421 N.E.2d 278, 285 (1981) (implicitly applying an "underlying facts" test); *Bass v. Scott*, 79 Ill.App.3d 224, 226, 34 Ill.Dec. 561, 563, 398 N.E.2d 236, 238 (1979) (test is "whether the underlying facts are identical in both actions or whether the same evidence would sustain both actions").

Id. at 513 n.6.

[6] The panel in *Frier v. City of Vandalia*, 770 F.2d 699, 702-03 (7th Cir. 1985), also relied upon the underlying policies of res judicata.

> [T]he conclusiveness of the judgment in such case [the prior action] extends not only to matters actually determined, but also to other matters which could properly have been raised and determined therein. This rule applies to *every question relevant to and falling within the purview of the original action*, in respect to matters of both claim or grounds of recovery, and defense, which could have been presented by the exercise of due diligence.
>
> *Hughey v. Industrial Commission*, 76 Ill.2d at 582, 31 Ill.Dec. at 789, 394 N.E.2d at 1166 (citations omitted).

Id. at 514 (emphasis supplied).

The *Hagee* court concluded that:

> The principle that res judicata extends to *all matters within the purview of the original action*, whether or not they were actually raised, is tantamount to a rule requiring parties to consolidate all closely related matters into one suit. As such, the principle serves well the interest of judicial economy, and thus it is at the core of the res judicata doctrine.

Id. (footnotes omitted; emphasis supplied). The *Hagee* panel did not define the term "closely related matters." However, its extraction of two "corollaries" from the foregoing principle gives some guidance to this otherwise amorphous concept:

> Two corollaries of that principle are also of fundamental importance to Illinois's res judicata doctrine. First is the rule that a party may not maintain two suits based on the same set of facts by the simple expediency of limiting the theories of recovery advanced in the first. The second rule is that a party may not maintain two suits based on the same set of facts simply by altering the claim for relief from one suit to the next.

Id. (citations omitted). It is important to note that both these corollaries rely on the premise that the two suits in question were based on the "same set of facts." This emphasis on the factual basis for the two suits did not escape the attention of a later panel in *Kirk*, which suggested that the factual similarities of the two suits was perhaps the harmonizing principle in the Illinois cases. "[T]here is language in Illinois cases which suggests that the 'same evidence' and 'same core of operative facts' tests are the same." *Kirk*, 811 F.2d at 352 n.8. Consequently, concluded the court, "we are less concerned with the label that the Illinois courts put on their analysis than with the way in which they apply the doctrine." *Id.* "Illinois cases applying (or, more importantly, declining to apply) *res judicata* are instructive more for their holdings than for the tests which they purport to apply." *Id.* at 352.

C. *The Present Case*

The collective wisdom of our brethren on cases requiring the court to unravel the mysteries of Illinois res judicata doctrine suggests that we focus our analysis on a comparison of the factual undergirding of the two cases at issue. From this perspective, it is clear that the two cases are quite dissimilar.

The instant action alleges a nine-year conspiracy by the defendants to deprive the plaintiffs of the fair use of their land. According to the plaintiffs, this conspiracy was effected by denying the plaintiffs zoning permits in 1971, water access in 1978, and sewage hookups in 1979. By contrast, the plaintiffs' earlier action was as an intervenor in an ongoing sewer dispute between other parties. Although the plaintiffs did file an amended intervenor complaint alleging that the defendants had, by means of the sewer disputes, endeavored to deprive them wrongfully of fair use of their land, that complaint was significantly narrower and different than the present suit. It dealt with sewage hookups alone and did not allege that the defendants had engaged in a multifaceted conspiracy.

Under the "proof" approach, *Hagee*, 729 F.2d at 512, these two causes of action are not the same. The proof that the plaintiffs would have to offer in this case in order to prevail is significantly different from the proof that was involved in the earlier state action. In the earlier suit, the evidence related to only a single event over a brief time span. By contrast, the present action involves multiple events over a much longer time span. Moreover, the plaintiffs could prove their cause of action in the instant case without relying on any facts at issue in the earlier action. *See Cranwill v. Donahue*, 426 N.E.2d 337, 339 (Ill. App. Ct. 1981) (causes of action are the same if "every fact necessary for the [first] action is necessary to the cause at bar"). Thus, under the evidence test, these are two different causes of action.

Under the "transactional" approach the same result obtains. The two suits do not arise "from the same transaction, incident or factual situation . . . ." *Hagee*, 729 F.2d at 513. While the two suits do have one transaction in common, the present suit is much broader in its scope and involves allegations arising out of several transactions that were not at all in issue in the earlier suit. Notably, this case falls within neither of the two corollaries established by the *Hagee* court to foster "a rule requiring parties to consolidate all closely related matters into one suit." *Id.* at 514 (footnote omitted). The plaintiffs have not attempted to "maintain two suits based on the same set of facts by the simple expediency of limiting the theories of recovery advanced in the first." *Id.* Nor have they tried to "maintain two suits based on the same set of facts simply by altering the claim for relief from one suit to the next." *Id.* Here, the present suit is based on a very different factual scenario and on a very different theory of recovery.

Nevertheless, it is argued that, because the plaintiffs were aware of the factual basis for the present suit at the time they amended their complaint in the state action to include constitutional claims, they were obliged to

bring their conspiracy complaint at that time. However, the defendants, who have the burden of establishing the proposition, *see Torres*, 814 F.2d at 1222, have not been able to demonstrate that the Illinois courts would consider these two factual scenarios so "closely related," *Hagee*, 729 F.2d at 514, that they would consider a suit based on one precluded if it were not brought in the same lawsuit as the other. *See Benton v. Smith*, 510 N.E.2d 952, 957 (Ill. App. Ct. 1987) (mere overlapping of facts in two cases, but not the key or operative facts, does not determine the res judicata issue). Indeed, there is authority in Illinois to the contrary. *See Fountas v. Breed*, 455 N.E.2d 200, 204 (Ill. App. Ct. 1983) (even when permissive joinder is possible, failure to bring both causes of action in the same lawsuit does not bar second action).

Accordingly, we conclude that the present action is not barred by the Illinois court's previous disposition of the plaintiffs' constitutional allegations with respect to sewer hookups. Under Illinois law, the current action does not involve the same cause of action as the previous state court suit.

D. *Conclusion*

We caution that our holding today that the present action is not barred by the doctrine of res judicata does not preclude the defendants from arguing to the district court that the Illinois judgment precludes, under the doctrine of collateral estoppel, further litigation of certain issues in this action. We also note that the defendants submitted to the district court that this action ought to be dismissed on the ground of abstention. In determining that the defendants' res judicata argument was meritorious, the district court specifically noted that it need not reach the abstention issue. On remand, the district court is, of course, free to address this issue.

The judgment of the district court is reversed.

REVERSED

APPENDIX B

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 8, 1988.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

LASALLE NATIONAL BANK OF CHICAGO,
as Trustee under Trusts Numbered
40244, 53645, 100385 and 100386,
UNITY VENTURES and WILLIAM ALTER,

Plaintiffs-Appellants,

No. 87-2497 vs.

THE COUNTY OF DUPAGE, a body politic, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 6517—**Paul E. Plunkett,** *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 24, 1988.

Before

Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

LASALLE NATIONAL BANK OF CHICAGO,
as Trustee under Trusts Numbered
40244, 53645, 100385 and 100386,
UNITY VENTURES and WILLIAM ALTER,

Plaintiffs-Appellants,

No. 87-2497 vs.

THE COUNTY OF DUPAGE, a body politic,
THE BOARD OF COMMISSIONERS OF DUPAGE
COUNTY, a body politic, THE VILLAGE OF
LISLE, a municipal corporation, and
THE VILLAGE OF WOODRIDGE, a municipal
corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 6517—**Paul E. Plunkett,** *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above entitled cause on September 22, 1988 by the defendants-appellees, no judge in active service has requested a vote thereon, and all the judges of the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Chief Judge William J. Bauer and Circuit Judge Frank H. Easterbrook did not participate in the consideration or decision of this case.

APPENDIX D

[Dated July 31, 1987]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LaSalle National Bank of Chicago, et al.,

Plaintiffs,

v.

The County of DuPage, et al.,

Defendants.

No. 82 C 6517—Honorable Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

This case is again before the court on a pending motion—this time, Defendants' motion to reconsider or to dismiss. This case involves a longstanding and often bitter dispute over Plaintiffs' attempts to develop a parcel of land in unincorporated DuPage County near the borders of the Villages of Lisle and Woodridge. After the Seventh Circuit dismissed Plaintiffs' original complaint alleging violations of the antitrust laws, *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), on April 1, 1987, we granted Plaintiffs leave to file an amended complaint. In so doing, we explicitly invited Defendants "to file a motion to dismiss on any pertinent grounds." This is that motion we invited.

We decline to reconsider our decision granting Plaintiffs leave to file their amended complaint, so we only consider the motion to dismiss. Defendants originally raised three grounds in support of their motion—*res judicata*, abstention, and legal insufficiency. In their reply brief, Defendants argue only the first two grounds, seemingly abandoning the claim of legal insufficiency, perhaps in light of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, ___ U.S. ___, 107 S. Ct. 2378 (June 9, 1987). We find the *res judicata* argument dispositive and therefore do not reach the abstention question.

Defendants urge us to find that prior proceedings in state court bar the instant suit. A state judgment must be given the same *res judicata* effect in federal court that it would have been given in a court of the rendering state. *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984); *Torres v. Rebarchak*, 814 F.2d 1219, 1222 (7th Cir. 1987); *Kirk v. Bremen Community High School District Board of Education*, 811 F.2d 347, 351 (7th Cir. 1987). Here, the rendering state is Illinois; hence, we must examine the preclusive effect of the state court proceedings under Illinois law.

In Illinois, a final judgment on the merits rendered by a court of competent jurisdiction bars the same parties or their privies from relitigating issues that were raised or could have been raised in the prior action. *See Torres*, 814 F.2d at 1222 and cases cited therein. The essential elements of the doctrine are: (1) an identity of parties or their privies in the two suits; (2) an identity of causes of action in the earlier and in the later suit; and (3) a final judgment on the merits in the earlier suit. *Id.*; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1983).

The present suit alleges a conspiracy in violation of 42 U.S.C. §1983 to deprive Plaintiffs of their right to develop several parcels of land in DuPage County known as Hobson Greene. The complaint charges Defendants with depriving Plaintiffs of their property without due process

of law; with violating Plaintiffs' rights to substantive due process; and with taking Plaintiffs' property without just compensation.

The relevant state proceedings are the following:

A. The first proceeding was Plaintiffs' challenge to the decision of the DuPage County Zoning Board of Appeals denying Plaintiffs a special use permit for their planned unit development on two portions of Hobson Greene. The Circuit Court for the Eighteenth Judicial Circuit, DuPage County, held the Zoning Board arbitrarily and capriciously denied the special use permit and ruled the County's zoning ordinance with respect to the property was unconstitutional. The Illinois Appellate Court for the Second District affirmed. *LaSalle National Bank v. County of DuPage*, 54 Ill. App.3d 387, 369 N.E.2d 505 (2d Dist. 1977). The reported opinion contains an excellent description of the Hobson Greene project and the parties' course of conduct up to 1977.

B. The second proceeding was Plaintiffs' intervention in a pending lawsuit, in an attempt to obtain sewer connection permits. After Plaintiffs received the zoning it required, they encountered difficulty in obtaining water service for the development. The Village of Woodridge refused to provide water to the development unless it was annexed to Woodridge, and Woodridge attached unreasonable and burdensome conditions to the terms of the annexation. The Village of Lisle refused to provide Plaintiffs' development with water on any terms because Lisle had an agreement with Woodridge assigning each municipality the exclusive right to annex or provide water to particular territories. Hobson Greene was within Woodridge's territory. Plaintiffs resorted to well water, but in doing so, had to split its development into three phases.

Plaintiffs also needed sewer service for their development, and needed permits from the Illinois Environmental Protection Agency (IEPA) and the County to construct sewer lines and to connect them to a sewage treatment plant. Plaintiffs received the necessary permits from IEPA

for Phase One and Phase Two of Hobson Greene on February 8, 1979 and January 31, 1979, respectively. Each permit was valid for two years, meaning that Plaintiffs could preserve their rights by laying sewer pipe any time before early 1981.

In May 1979, the IEPA placed the Lisle-Woodridge sewage treatment plant on restrictive status, thereby prohibiting the issuance of any new permits. At this point, another developer in DuPage County (Corporate West) brought suit in the Circuit Court for the Eighteenth Judicial District against IEPA, DuPage, Lisle, and Woodridge, seeking a declaration that Corporate West could connect its development to the Lisle-Woodridge plant regardless of the IEPA's action placing the plant on restrictive status. *Corporate West v. Illinois E.P.A.*, 79 M.R. 257 ("*Corporate West*"). IEPA then filed a cross-claim against DuPage, Lisle, and Woodridge seeking to enjoin them from issuing further building or connection permits. Corporate West ultimately was allowed to connect its development to the plant and was dismissed out of the suit.

IEPA negotiated a settlement of the cross-claim with DuPage, Lisle, and Woodridge, authorizing a variable number of new connections depending on water quality, the capacity of a newly constructed sewage plant, etc. DuPage, Lisle, and Woodridge then allocated those new connections amongst themselves. Judge Teschner entered an order on August 13, 1980, embodying the settlement agreed upon to settle the cross-claim.

Plaintiffs had had no part in the *Corporate West* suit or IEPA's cross-claim until after Judge Teschner entered the agreed order on August 13, 1980. Then, on October 10, 1980, Plaintiffs sought to intervene in the *Corporate West* suit to challenge the settlement and order. Plaintiffs claimed the settlement misallocated new connection permits to its detriment, and claimed the right to be heard before such an adverse action was taken. The original intervention petition ultimately was mooted by the construction of a new sewage treatment plant with suffi-

cient capacity to treat all the sewage generated by Hobson Greene.

C. The focus then shifted from the Circuit Court to administrative proceedings before the Illinois Pollution Control Board (the "Board"). In October 1980, Plaintiffs commenced an administrative proceeding before the Board seeking extended of the term of the sewer permit previously obtained by Plaintiffs from the IEPA for Hobson Greene Unit Two, which permit was set to expire January 30, 1981. The Board denied the permit December 19, 1980, but on February 2, 1982, the Illinois Appellate Court for the Second District reversed on procedural grounds and remanded the proceeding to the Board. On December 15, 1983, the Board unanimously denied Plaintiffs' petition for an extension. This time, the Appellate Court affirmed. *Unity Ventures v. Pollution Control Board*, 132 Ill. App.3d 421, 476 N.E.2d 1368 (2d Dist. 1985). The opinion affirming the Board's decision explains the proceedings before the Board and Plaintiffs' unsuccessful attempts to extend their sewer permit.

D. In April 1984, the new sewage treatment plant was operating satisfactorily. Accordingly, Judge Teschner dismissed the *Corporate West* suit along with Plaintiffs' intervenor action (*see* discussion in part B, supra) on May 13, 1984, with leave to amend. On July 11, 1984, Plaintiffs sought to file an amended complaint, asserting a section 1983 claim for the first time. After briefing and arguments, Judge Teschner, on October 28, 1985, allowed Plaintiffs to file their amended complaint seeking damages only. Judge Teschner transferred the case to the Law Division, where it was assigned to Judge Peccarelli.

Plaintiffs' amended complaint, although technically an intervenor complaint in *Corporate West*, was actually the only complaint still pending in that lawsuit. The amended complaint charged DuPage, Lisle, Woodridge, and the IEPA with violating Plaintiffs' rights to procedural due process, substantive due process, and rights under the Equal Protection Clause and the Just Compensation Clause.

The amended complaint focused on the Defendants' alleged wrongful interference with Plaintiffs' use of their sewer permits on Hobson Greene Unit Two, and wrongful interference in their ability to obtain sewer permits on Unit Three.

Defendants then moved to dismiss Plaintiffs' amended complaint. After receiving briefs on the issue, Judge Peccarelli granted the motion, entering a judgment order of dismissal on December 16, 1986. Judge Peccarelli held that Judge Teschner's order of August 13, 1980 did not affect Plaintiffs' right to construct or connect their sewer pipe. He ruled that Plaintiffs were never denied the right to connect, but the failure to obtain a sewer hookup was due to their own failure to do the necessary structural work. Judge Peccarelli concluded that "[Plaintiff] was never injured in fact; no justiciable issue is presented here; [Plaintiff] has no standing to bring this action." Order at 3. Judge Peccarelli entered judgment dismissing the action with prejudice. Plaintiffs appealed Judge Peccarelli's decision, and the appeal is being briefed before the Illinois Appellate Court.

This Complaint

While all of these proceedings were pending in various state fora, Plaintiffs also had a pending federal antitrust action in this court, which was filed in October 1982. We denied Defendants' motion to dismiss on state action grounds in January 1984, but certified an interlocutory appeal. The Seventh Circuit reversed, and dismissed the complaint. *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985). The Supreme Court denied certiorari, 106 S. Ct. 2892 (June 9, 1986). On remand to this court, Plaintiffs sought leave to amend their complaint. We denied the motion for leave to amend on July 2, 1986. Plaintiffs again appealed, and the Seventh Circuit remanded, with instructions for this court to consider the motion to amend "under normally applicable procedures." (Order of Sept. 19, 1986 (7th Cir.)) After receiv-

ing briefs on Plaintiffs' renewed motion to amend their complaint, we granted Plaintiffs leave to amend on April 3, 1987.

In the amended complaint before us, Plaintiffs allege a fifteen-year conspiracy by DuPage, Lisle, Woodridge, and IEPA to block Plaintiffs' lawful development of Hobson Greene. Plaintiffs point to the zoning denial, the water and annexation denial, and the sewer permit denial all as overt acts demonstrating the existence of an unlawful conspiracy. Plaintiffs claim violations of procedural due process, substantive due process, and of the Equal Protection, and Just Compensation Clauses.

1. *Identity of Parties*

There is no dispute on the first element of *res judicata.* The parties in all previous lawsuits are the same as in the present suit.

2. *Identity of Causes of Action*

Plaintiffs claim this suit is not identical to any previous state court proceeding. They claim this case involves an allegation of an entire fifteen-year illegal conspiracy, whereas the state suits each involved only a part of the whole conspiracy (the zoning portion, or the extension of a sewer permit portion, or the denial of sewer hookups, etc.) We accept, arguendo, Plaintiffs' contention that the present lawsuit is different from the *Corporate West* action or any other state proceeding. However, the question on *res judicata* is not just whether the claims were presented previously, but whether the claim was *or* should have been presented in an earlier action. *Torres,* 814 F.2d at 1222, *citing Yaw v. Beeghly,* 109 Ill. App.3d 627, 440 N.E.2d 1066 (1st Dist. 1982).

The Seventh Circuit recently addressed the applicability of the *res judicata* doctrine in an analogous case. *Button v. Harden,* 814 F.2d 382 (7th Cir. 1987). In *Button,* the plaintiff, a tenured school teacher, was fired after a

hearing officer determined a dismissal was warranted. Plaintiff then appealed to an Illinois circuit court, which affirmed the dismissal. Plaintiff then filed a section 1983 suit claiming he was fired in retaliation for exercising his first amendment rights. The Seventh Circuit affirmed the district court's dismissal of the section 1983 action on *res judicata* grounds.

The court stated that when Plaintiff lost before the hearing officer, he had two choices—either bring his section 1983 action in federal court forthwith; or, file in Illinois circuit court for judicial review of the hearing officer's decision. If Plaintiff followed the second route, he had to allege every ground for relief he possessed, else he would be guilty of splitting his cause of action. *Button*, 814 F.2d at 383-84; *see also Edwards v. City of Quincy*, 124 Ill. App.3d 1004, 464 N.E.2d 1125 (4th Dist. 1984). The failure to raise all grounds in the judicial review process barred litigation in subsequent proceedings all grounds not previously presented.

In the present case, Plaintiffs have had multiple opportunities to allege the whole conspiracy claimed in this suit. Plaintiffs could have alleged the conspiracy when they appealed the adverse determination of the Pollution Control Board. They could have alleged the conspiracy as part of the original intervenor complaint in the *Corporate West* proceedings. Most recently, Plaintiffs could have raised the whole conspiracy in the amended intervenor complaint in the *Corporate West* proceeding. Plaintiffs were aware of a potential section 1983 claim because they alleged such a claim in the amended intervenor complaint. In that complaint, Plaintiffs had to raise every ground for obtaining damages based on civil rights violations, else be open to a charge of splitting their cause of action. And that is precisely what happened here—Plaintiffs raised part of their section 1983 claim in state court and part of it here. This claim splitting is improper, since Plaintiffs could have brought their entire section 1983 suit in the amended intervenor complaint.

3. *Final Judgment on the Merits*

Plaintiffs contend that Judge Peccarelli's dismissal of their section 1983 action was not "on the merits" and therefore does not bar the instant action. We disagree. It is true that a decision "not on the merits" does not bar further litigation. *American National Bank & Trust Co. v. City of Chicago,* No. 86-2131, slip op. at 10 (7th Cir. July 13, 1987). In *American National,* the Seventh Circuit recognized that not all dismissals are decisions "on the merits." If a suit is filed in a court lacking subject matter jurisdiction, or is filed before the controversy is ripe, the adjudication is not "on the merits." *Id.*, slip op. at 10-11. On the other hand, a decision which does not have the effect of inviting a refiling in another court or at another time, usually will have preclusive effect. *Id.*

Here, it is clear that Judge Peccarelli's dismissal was "on the merits." He stated that Plaintiffs suffered no injury in fact; and any real injury was self-inflicted. He did use the word "standing," but not in the context urged by Plaintiffs. Judge Peccarelli correctly ruled that only an injured party may bring suit. He held that Plaintiffs had not been injured by Defendants; he did not hold that someone *had* been injured but that this Plaintiff technically was the wrong party to sue. That ruling was one on the merits. Accordingly, the doctrine of *res judicata* will apply.

Conclusion

This suit is a prime example of a dispute that deserves application of the *res judicata* doctrine. The dispute between the parties has raged for far too long—a definitive resolution should have been achieved long ago. This suit has been before the United States Supreme Court, the Illinois Supreme Court, the Court of Appeals for the Seventh Circuit twice, the Illinois Appellate Court at least four times, the District Court for the Northern District of Illinois at least three times, and before various circuit courts and administrative tribunals of the State of Illinois

more times than we can count. The failure to raise a conspirary claim at any time during the continuing litigation in the Illinois courts despite repeated opportunities to do so bars this present action.

Defendants' motion to dismiss is granted, and the amended complaint is hereby dismissed with prejudice.

ENTER:

/s/ PAUL E. PLUNKETT
Honorable Paul E. Plunkett
District Court Judge

Dated: July 31, 1987

APPENDIX E

[Filed October 26, 1982]

[Cover and Table of Contents omitted in printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LaSalle National Bank of Chicago, as Trustee under Trusts Numbered 40244, 53645, 100385 and 100386, Unity Ventures and William Alter,

Plaintiffs,

vs.

The County of DuPage, a body politic; The Board of Commissioners of DuPage County, a body politic; The Village of Lisle, a municipal corporation; and The Village of Woodridge, a municipal corporation,

Defendants.

No. 82 C 6517—Paul E. Plunkett, Judge
Jury Trial Demanded

COMPLAINT

Plaintiff complains of the defendants and each of them as follows:

I. INTRODUCTION

Nature of the Action

1. Plaintiffs bring this action for money damages and declaratory and injunctive relief because of defendants' agreement, conspiracy, and concert of action in violation of the anti-trust laws, whereby defendants sought to, and continue to, suppress competition in luxury residential and commercial development in the Chicago metropolitan area, and specifically in a certain section of DuPage County through a series of illicit agreements between and among the defendants and various other persons and entities unknown to plaintiff at this time. The defendants' purpose, and the effect of their actions, was and is to control the market for new luxury residential and commercial development in their own parochial interests and to unreasonably restrain competition, to the specific damage of individual developers, including plaintiffs.

II. JURISDICTION

2. The jurisdiction of this Court is invoked under Sections 4 and 16 of the Clayton Act, as amended, 15 U.S.C. §§15 and 26, and 28 U.S.C. §§1337 and 2201 for violations of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 2 of the Sherman Act, 15 U.S.C. §2.

3. Venue exists by virtue of Sections 4 and 12 of the Clayton Act, as amended, 15 U.S.C. §§15 and 22, and 28 U.S.C. §1391(c). Each of the defendants resides, is found, has an agent, transacts business or is doing business within the Northern District of Illinois; moreover, the unlawful activities complained of herein were carried out within this District.

III. PARTIES

Plaintiffs

4. Plaintiff LaSalle National Bank of Chicago is the legal title holder of approximately 145 acres of land (the

"Greene Farm") located in an unincorporated section of DuPage County as trustee under trust agreements numbered 40244, 53645, 100385 and 100386.

5. Plaintiff William Alter ("Alter") is a beneficiary of the land trusts described above. Alter is and has been engaged in the development of the Greene Farm as a project known as the Hobson Greene Development ("Hobson Greene") discussed in detail hereafter. Alter is also the managing partner of Unity Ventures described in the next paragraph.

6. Plaintiff Unity Ventures is an Illinois partnership with its principal place of business in Wilmette, Illinois. Its business activities include the development and management of the Hobson Greene Development. It is also a beneficiary of certain of the land trusts described in paragraph 4.*

Defendants

7. Defendant County of DuPage ("DuPage County") is a local governmental unit and body politic, established and governed by the Constitution and laws of the State of Illinois.

8. Defendant Board of Commissioners of DuPage County (the "Commissioners") is a body politic designated by statute to govern and administer the affairs of DuPage County, as set out hereafter.

9. Defendant Village of Lisle ("Lisle") is a municipal corporation and body politic of the State of Illinois located in DuPage County, Illinois.

10. Defendant Village of Woodridge ("Woodridge") is a municipal corporation and body politic of the State of Illinois located in DuPage County, Illinois.

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* All plaintiffs are hereafter collectively described as "plaintiff" unless otherwise indicated.

IV. THE RELEVANT MARKET

A. The Market For Luxury Housing

11. Greene Farm is located in the Chicago metropolitan area. Within the Chicago metropolitan area, developers compete to provide luxury housing to upper income individuals who live, or plan to live, in the area. Developers also compete to develop commercial properties designed to serve these individuals. Such development is financed through capital markets which operate nation wide, and utilizes building equipment and materials manufactured nation wide.

12. This luxury type housing is not scattered randomly throughout the Chicago metropolitan area; rather, it is concentrated in a few communities which have developed a reputation as "desirable" places to live. Examples of such communities in the Chicago area are Oakbrook, Wayne, Lake Forest and Barrington.

B. The Greene Area

13. The area surrounding Greene Farm in DuPage County is one of the areas in the Chicago metropolitan area which is generally considered "desirable," and is thus an area where developers seek to build and market housing designed for upper income persons. This area consists of approximately 1,500 acres, bounded on the north by Maple Road, on the west by Naperville, on the south by the Greene Valley Forest Preserve, and on the east by Illinois Route 53. (This area is hereafter referred to as the "Greene Area"). Much of this area is located in the unincorporated section of DuPage County. The Villages of Lisle and Woodridge are located on the eastern edge of this area.

14. Prior to 1970, the Greene Area was an area of low population density and relative low land values. Because the Greene Area was served by an existing network of roads and highways and public transportation, and because of its proximity to Chicago and other communities in the

Chicago metropolitan region, the Greene Area was and is ideally suited for a luxury type development, as described above.

15. Beginning in approximately 1970, developers, including plaintiff, commenced to acquire farm and other developed and undeveloped real property in the Greene Area for luxury commercial and residential development.

C. The Hobson Greene Development

16. Plaintiff acquired the Green Farm property in approximately 1969 in order to create Hobson Greene, a development which, when it is completed will consist of approximately 268 single family homes, 713 dwelling units of multiple family housing, a commercial center of stores, large open and recreational spaces, and equestrian trails leading to a County forest preserve east of Hobson Greene.

17. The Greene Area which surrounds Hobson Greene is also largely unincorporated, consists of many large estates and is considered an extremely desirable and prestigious area. As more fully described hereafter, Woodridge at all times pertinent hereto desired to annex Hobson Greene into its corporate limits.

18. Because of the illegal conspiracy in restraint of trade described hereafter, plaintiff has been unable to complete Hobson Green.

D. Competition Between Developers

19. Developers in the Greene Area at all times pertinent hereto compete and have competed in the sale and rental of upper income residential and commercial structures (hereafter described as "developments").

20. In order to successfully complete a development and otherwise compete effectively with other developers in the Greene Area and in the Chicago metropolitan area generally, a developer must obtain, among other things,

appropriate zoning, water service, and sewer service to dispose of the sewage that the development generates.

21. In the Greene Area, the local governments of the County of DuPage and the Villages of Lisle and Woodridge control the zoning, water and sewer services required by developers like plaintiff.

E. Competition Between Local Government Units

22. In addition to the competition among developers in the Greene Area in the manner just described, various local governmental units in that area also compete with each other to provide certain profitable utility services, like water service, to new developments.

23. In addition, municipalities in the Greene Area compete with each other to annex certain developments which, if annexed to a particular municipality, will upgrade the public image and reputation of the municipality, increase the tax base of the municipality and will otherwise benefit the municipality.

24. At all times pertinent hereto, a developer of property located in the unincorporated part of the Greene Area normally approaches the County and one or more adjacent or nearby municipalities to determine the zoning, permit and annexation fees, land donations, and other requirements and benefits that each offers or requires of a developer located within its jurisdiction. A developer then agrees to annex his property to that municipality which offers the most attractive mix of benefits and requirements for annexation. However, if no municipality offers an attractive mix of benefits or requirements for annexation, the developer will then cause his development to remain in an unincorporated area of Central DuPage County.

V. CONSPIRACY IN RESTRAINT OF TRADE

25. Beginning in or about 1971, Lisle, Woodridge, the County of DuPage, and various other local government

units, government officials, and developers, unknown to plaintiff at this time, entered into an agreement, conspiracy and concert of action in the Greene Area to restrain competition among developers of property for commercial and residential purposes, and among local governmental units in the manner described herein. As part of this conspiracy, defendants used, among other mechanisms, a series of contracts and agreements among and between the municipalities which defined territories within which each municipality had the exclusive right to annex developments in the unincorporated parts of the Greene Area and to otherwise impose anti-competitive conditions upon developers of property in the Greene Area. This conspiracy is continuing in nature.

26. In particular, and without limitation, the defendants conspired and agreed to eliminate competition in residential and commercial developments by the following means:

(a) In or about 1971, defendants entered into a series of agreements regulating the provision of sewer service in Central DuPage County;

(b) In or about 1974, the defendants entered into an agreement to deny William Alter a special use permit for which he had applied to the DuPage County Zoning Board of Appeals, and without which the Hobson Greene development would not proceed.

(c) In or about 1978, defendants entered into a series of agreements which set boundaries within which each local government unit is given the exclusive right to annex new developments and to provide utility services to new developments; and

(d) On August 13, 1980, the defendants entered into an agreement to geographically allocate the available sewage capacity among the defendants.

27. The purpose and effect of this agreement, conspiracy and concert of action was and is to depress the ordinary

competition between developers within the Greene Area, and between developers in the Greene Area and developers of luxury housing in other parts of the Chicago metropolitan area and between local government units. This conspiracy has had an effect on a substantial amount of interstate commerce.

VI. OVERT ACTS

A. 1971 Sewage Service Agreements Allocating Territory And Capacity

28. On or about November 2, 1971, DuPage County and Woodridge entered into an agreement relating to the provision of sewer service in Woodridge and certain areas of unincorporated DuPage County. A copy of this agreement is attached as Exhibit A.

29. This agreement (Section 2, Paragraph A) provides:

> The Village shall have complete determination of sewer service extensions to those areas outside the Village limits which will be served by the existing Village sewer system or as the same shall from time to time be expanded and the County shall provide treatment service to such areas.

30. This Agreement further provides (Section 2, Paragraph E):

> In the event of a requirement that the sewage treatment plant capacity be subject to allocation or reservation of excess capacity, the Village shall have the right of first refusal with respect to such allocation or reservation to the extent of service applicable to not less than 1,000 connections per year, for the first 5 years after said requirement and not less than 650 per year thereafter.

31. Plaintiffs are informed and believe that the Village of Lisle entered into a similar agreement for sewer service with DuPage County in or about 1971, and that this agreement contained similar language allocating sewer service territory and capacity.

B. Conspiracy To Block Zoning For Hobson Greene

32. On May 18, 1970, plaintiff filed a petition with the DuPage County Zoning Board of Appeals which requested that a special use permit be granted for a planned unit development ("PUD") on the Greene Farm property. This permit would have allowed plaintiff to proceed with the Hobson Greene Development, as described above.

33. Although defendant DuPage County granted a special use permit for an essentially identical planned development directly north of plaintiff's property, on December 24, 1974 the County Board finally denied the permit as to the Greene Farm property.

34. After three years of litigation, the Illinois Appellate Court held that the County's denial of the special use permit was improper. (*LaSalle National Bank v. County of DuPage*, 54 Ill. App.3d 387, 369 N.E.2d 505 (2d Dist. 1977).)

C. Agreements To Allocate Territory For Future Annexation

35. In or about 1978, and possibly beginning at an earlier date, the defendants Lisle, Woodridge and other municipalities unknown to plaintiff at this time entered into a series of agreements whereby each municipality was assigned a particular territory within which it would have the exclusive right to annex territory. Each defendant agreed not to annex any development or other property located in another government's territory.

36. As a part of the allocation of territory for future annexation described above, the defendants agreed to respect these boundaries in regard to the provision of utility services. In particular, each municipality agreed not to provide water service to any property located within another unit's territory.

D. Woodridge's Tying Of Water Service To Annexation

37. In 1978, William Alter approached the Village of Woodridge to request water service for the proposed Hobson Greene Development.

38. Woodridge refused to provide such service, unless plaintiffs agreed to annex the Greene property to Woodridge.

39. Thereafter, defendant Village of Lisle refused to consider providing water service to the proposed development, because it was in Woodridge's territory.

E. 1980 Allocation Of Sewage Treatment Capacity

40. On April 25, 1979, the Illinois Environmental Protection Agency ("IEPA") determined that the sewage treatment facilities in central DuPage County were over burdened. The IEPA sought to place a freeze on all further connections to the area sewage treatment facilities until such time as the capacity of the facilities was increased.

41. The defendants were unwilling to accept such a limitation on growth within their respective territories. After a series of discussions between the defendants and the IEPA, the IEPA agreed to allow a certain number of connections (measured in population equivalent or "P.E.") in return for the upgrading of the local sewage treatment facilities.

42. In furtherance of the conspiracy to allocate territory for new development, described herein, the defendants entered into an agreement between themselves allocating the P.E. allowed by the IEPA among themselves.

43. This allocation of P.E. was agreed upon among the defendants without giving any developer, including plaintiff, who had a vested interest in P.E. pursuant to a valid IEPA permit, notice or an opportunity to be heard. In

particular, the defendants agreed to allocate the available P.E. in an arbitrary and capricious manner which assigned a disproportionate amount of P.E. to the Villages of Lisle and Woodridge.

VII. UNREASONABLE RESTRAINT ON INTERSTATE COMMERCE

44. The intent, tendency and inherent nature of the aforesaid agreement, combination, conspiracy and concert of action represent and constitute an unreasonable restraint on interstate commerce in that residential and commercial development in the Greene Area is and will continue to be governed by the agreements entered into among and between the various local governmental entities, rather than by the unfettered competition between the developers and between the various local governments. In particular, developers or potential developers of property in the central DuPage County area will be foreclosed from negotiating for favorable terms with various local government entities and instead will be forced to accept whatever terms the local government within whose territory the developer's property is located is willing to offer. This agreement, combination, conspiracy and concert of action has disuaded and will continue to disuade developers from acquiring and developing property in the Greene Area, thus lessening competition in the luxury housing market in the Chicago metropolitan area generally. Additionally, the 1980 agreement allocating the remaining sewage treatment capacity eliminates competition among the developers in the Greene Area. Rather than competing with all other developers in the area for sewage service, each developer will only be able to compete with other developers in the particular territory where its property is located, and each developer will only be able to compete for a limited portion of the total available sewage capacity.

VIII. SPECIAL INJURY TO PLAINTIFF

45. Plaintiff's property is located in unincorporated DuPage County within the Woodridge development territory. As a result of the conspiracy complained of herein, plaintiffs have been unable to develop their property as originally contemplated. The defendants' actions have forced plaintiffs to substantially redesign the Hobson Greene Development with the result that the development will be substantially less profitable. Additionally, defendants' actions have caused significant delay in plaintiffs' development of the Greene Farm property substantially increasing the cost of the Hobson Greene Development and jeopardized the development entirely.

46. In particular and without limitation, plaintiffs have been damaged by defendants' allocation of territory in the following instances:

(a) In 1979, plaintiffs obtained a permit from the IEPA allowing them to connect the Hobson Greene sewage system into the central DuPage County area sewage treatment system. As a result of the defendant's agreement to allocate the remaining P.E., described above at paragraph 28-31 the total sewage capacity allocated to unincorporated DuPage County, where the Greene Farm property is located, is less than the amount of sewage for which plaintiffs have a permit. Therefore, plaintiffs have not been and will not be able to exercise their rights under their permit.

(b) The delay caused by the County Board's arbitrary and capricious denial of plaintiff's petition for a special use permit, described in paragraphs 32-34 above, has caused plaintiff to delay its development for three years, and to incur substantial attorneys fees.

(c) Defendant Village of Woodridge's wrongful refusal to provide the Greene Farm property with water service, described in paragraphs 25-27 above, forced plaintiffs to substantially decrease the density of the proposed Hobson Greene Development, thereby greatly reducing the potential profitability of the development project.

47. As a result of the above-described wrongful conduct of defendants, plaintiffs' development of the Hobson Greene project has been substantially delayed and plaintiffs have had to incur substantial additional costs. In particular and without limitation plaintiffs have suffered the following damage as a result of defendants' wrongful conduct described above:

(a) Increased interest overhead, including office and other personnel who must be employed but have been unable to work on the development and assorted carrying costs for the Greene Farm property.

(b) Lost profit from their inability to effect the Hobson Greene development plan as originally formulated.

(c) Attorneys fees and related costs of challenging defendants' conduct in various state court and administrative forums.

(d) Lost profit from additional developmental activities which plaintiffs could have undertaken but for defendants' conduct.

IX. RELIEF

WHEREFORE, plaintiffs pray:

A. That this Court declare the boundary agreements between and among the Villages of Lisle, Woodridge, and unknown entities, and the August 31, 1980 agreement between and among the defendants to be in violation of Sections 1 and 2 of the Sherman Act;

B. That this Court issue a temporary restraining order, preliminary injunction and permanent injunction enjoining the defendants from enforcing all territorial agreements, service territory allocation agreements or sewage capacity allocation agreements, or entering into any such further agreements in the future;

C. That plaintiffs recover compensatory damages in the amount of $25,000,000 or such greater or lesser amount as determined by a jury, to be trebled according to law;

D. That plaintiffs recover their costs and attorney fees in this suit; and

E. That plaintiffs have such other and further relief as the Court may deem just.

Respectfully submitted,

/s/ ALAN MILLS
One of the attorneys for
Plaintiffs

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[Exhibit A omitted in printing]

APPENDIX F

IN THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, WHEATON, ILLINOIS

CORPORATE WEST DEVELOPMENT, INC.,

Plaintiff,

and

WILLIAM ALTER, SHELDON SIMBORG AS TRUSTEE OF UNITY TRUST, JOSEPH ASH AS TRUSTEE OF FAMILY UNITY TRUST, MILTON LEVENFELD AS TRUSTEE OF DAVIS FAMILY TRUST, JOSEPH ASH AS TRUSTEE OF RHONDA, MICHAEL, HARVEY, JONATHAN AND JENNIFER TRUST, JOSEPH ASH AS TRUSTEE OF R.L.A., M.J.A., H.L.A., J.B.A. AND J.S.A. TRUST, PARTNERS IN A PARTNERSHIP NAMED UNITY VENTURES,

Intervenor-Plaintiffs,

No. 79 MR 257 v.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

INTERVENOR-PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

William A. Alter, Sheldon Simborg as trustee of Unity Trust, Joseph Ash as trustee of Family Unity Trust, Milton Levenfeld as trustee of Davis Family Trust, Joseph Ash as trustee of Rhonda, Michael, Harvey, Jonathan and Jennifer Trust, Joseph Ash as trustee of R.L.A., M.J.A., H.L.A., J.B.A. and J.S.A. Trust, partners in a partnership named Unity Ventures, Intervenor-Plaintiffs, (herein-

after sometimes collectively referred to as "Unity"), pursuant to Section 57.1 of the Illinois Civil Practice Act, as their Complaint against the Defendants Illinois Environmental Protection Agency, Village of Lisle, Village of Woodridge, and County of DuPage, allege as follows:

Nature Of The Action

1. Unity brings this action for damages, injunctive and declaratory relief. Unity complaints herein that defendants have wrongfully prevented Unity's lawful development of its Hobson Greene project, as described in full hereafter. Unity further complains that defendants have wrongfully prevented it from using its lawful sewer permits thus preventing Unity from developing its Hobson Greene project. Defendants actions have denied Unity substantive and procedural due process and equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1983, and Article 1, Section 2 of the Constitution of the State of Illinois. Alternately, defendants have taken Unity's property without compensation in violation of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1983, and Article 1, Section 15 of the Constitution of the State of Illinois.

The Parties

2. Unity Ventures is a partnership of which all other intervening plaintiffs are partners. Unity's principal place of business is at 3000 Glenview Road, Wilmette, Illinois. Unity is organized and operates under the laws of the State of Illinois.

3. Unity is now and, at all times pertinent to the allegations herein, has been involved in the development of certain parcels of land located at or near the intersection of 75th Street and Greene Road in Lisle Township, DuPage County, Illinois. This development is commonly known as Hobson Greene.

4. Defendant County of DuPage ("the County") is a unit of local government and body politic, established and governed by the Constitution and laws of the State of Illinois.

5. Defendant Village of Lisle ("Lisle") is a municipal corporation and body politic of the State of Illinois located in DuPage County, Illinois.

6. Defendant Village of Woodridge ("Woodridge") is a municipal corporation and body politic of the State of Illinois located in DuPage County, Illinois.

7. Defendant Illinois Environmental Protection Agency ("IEPA") is an agency of the State of Illinois. As is described hereafter, IEPA is responsible for approving or denying permits to construct and connect sanitary sewer lines and facilities.

Unity's Proposed Development

8. Unity acquired property in DuPage County in approximately 1969 in order to create Hobson Greene, a development which, when it is completed, will consist of approximately 268 single family homes, 713 dwelling units of multiple family housing, a commercial center of stores, large open and recreational spaces, and equestrian trails leading to a County forest preserve east of Hobson Greene.

9. This proposed development was a legitimate use of Unity's property and would have been fully consistent with all applicable reasonable land use statutes, rules and regulations. Unity's right to develop Hobson Greene is protected by the Constitution of the State of Illinois and the Constitution of the United States.

10. Hobson Greene is located in an unincorporated area of DuPage County. It is located just beyond the western boundaries of Lisle and Woodridge.

11. Unity is developing Hobson Greene in three phases and in connection therewith, has acquired or will have to acquire approval from the IEPA and the County in order

to construct and connect the sanitary sewer lines and facilities needed to complete its planned development.

12. Pursuant to a permit issued on February 8, 1979 to Unity by IEPA, the sanitary sewer lines and facilities have been constructed and installed for the first phase of Hobson Greene ("Unit One"). County building permits and connection permits have been obtained, and Unit One is approximately fifty percent completed.

13. On January 31, 1979, Unity was issued a permit by the IEPA to construct and connect sanitary sewer lines and facilities to service the second phase of Hobson Greene ("Unit Two"). County building permits and connection permits are required to construct buildings and connect them to the sanitary sewer lines and facilities in Unit Two. These latter permits have not been obtained as a result of the events described thereafter. Unity has expended substantial funds in reliance on this permit; however, it has not commenced construction of the sanitary sewer lines and facilities for Unit Two. Unity has a property right in this permit which is protected by the Constitution of the State of Illinois and by the United States Constitution.

14. Unity is presently awaiting certification from the County, allowing it to proceed with applications for permits with respect to the construction and connection of sanitary sewer lines and facilities to serve the third phase of Hobson Greene ("Unit Three").

Defendants' Wrongful Interference
With Unity's Use Of Its Permits

15. On May 30, 1979, the IEPA placed the Lisle and Woodridge Sewage Treatment Plants ("the affected facilities") on restricted status as they were operating dangerously close to capacity. Subsequently, the IEPA sought to stop any further sanitary sewer connections to said treatment facilities.

16. The IEPA's request, if granted, would have effectively extinguished all of Unity's rights under its January 31, 1979 permit.*

17. The IEPA and all other defendants had actual knowledge of Unity's January 31, 1979 permit, and had actual knowledge of Unity's address.

18. After the instant action was filed, the defendants entered into an extended period of negotiation among and between themselves regarding the number of sanitary sewer connections to the affected facilities that would be allowed.

19. The IEPA eventually agreed with Lisle, Woodridge, and the County upon a certain formula for determining the number of connections which would be allowed.

20. Subsequent to that agreement, Lisle, Woodridge, and the County agreed among themselves, without the participation of the IEPA, to allocate the available connections among and between themselves. Said agreement unfairly allocated a disproportionate share of the available connections to Lisle and Woodridge at the expense of developers of property located in unincorporated DuPage County.

21. On August 13, 1980, pursuant to a Stipulation entered into by the IEPA, Lisle, Woodridge, and the County, this Court entered an order which in substance embodied the agreements described above in paragraphs 16 and 17.

22. This Order had the effect of extinguishing Unity's rights under its January 31, 1979 permit and had the effect of preventing Unity's development of Hobson Greene.

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* The permit for Unit I is not at issue in this action as construction had commenced on the sanitary sewer lines and facilities for Unit One prior to the filing of the instant action. This permit was thus unaffected by this action.

23. At no time prior to August 13, 1980, would the connection of the Unit Two sanitary sewer lines and facilities to the affected facilities have presented any danger to the health and safety of the area residents nor would it have had any adverse impact on water quality.

24. Unity received no notice of the IEPA's complaint, had no opportunity to participate in the parties' negotiations, nor did it receive notice, nor have an opportunity to be heard prior to the entry of the August 13, 1980 Order.

DAMAGE TO UNITY

Unit Two

25. As a result of the August 13, 1980 Order, Unity has been unable to begin construction of the sewer lines and facilities for Unit Two, and thus has been unable to proceed with the second phase of the Hobson Greene development.

26. As a result of its inability to begin said construction, Unity's January 31, 1979 permit expired on January 31, 1981.

27. After Unity obtained the January 31, 1979 permit the County enacted a new ordinance ("the Ordinance") which requires all applicants for sewer permits like that obtained by Unity on January 31, 1979, to pay all connection charges *prior* to applying for construction permits. The prior ordinance in effect on August 13, 1979 had required payment of the permit fees only at the time of application. The connection fee (by far the larger sum) was not required until the time of connection.

28. As a result of defendants' actions described herein, Unity must pay an additional $760,000 in order to obtain a permit which would give it rights equivalent to those it had pursuant to its January 31, 1979 permit.

29. The newly completed Green Valley plant is likely to be operating at or near capacity before Unity can con-

nect to the plant because of connections by persons who presently hold permits or who will obtain permits prior to the date on which Unity will be able to obtain a new permit.

30. As a further result of defendants' actions described herein, Unity may be unable to use the new Green Valley plant and it will thus continue to be prevented from developing Unit Two.

Unit Three

31. As a result of the August 13, 1980 Order, Unity was unable to obtain a permit authorizing construction of sewer lines and facilities for Unit Three, and has thus been unable to proceed with the third phase of the Hobson Greene Development.

COUNT ONE

Procedural Due Process

1-31. Intervenor-Plaintiffs reallege paragraphs 1 through 31 both inclusive as paragraphs 1 through 31 of this Count One.

32. The rights of Unity under its January 31, 1979 permit and its right to lawfully develop its property are rights protected and secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and by the Due Process Clause of Article 1, Section 2 of the Constitution of the State of Illinois.

33. Defendants' failure to provide Unity with notice and an opportunity to be heard prior to the entry of the August 13, 1980 Order violates the right of Unity to procedural due process under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983, and under Article 1, Section 2 of the Constitution of the State of Illinois.

COUNT TWO

Equal Protection

1-31. Intervenor-Plaintiffs reallege paragraphs 1 through 31 both inclusive as paragraphs 1 through 31 of this Count Two.

32. The rights of Unity under its January 31, 1979 permit and its right to lawfully develop its property are rights protected and secured by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Equal Protection Clause of Article 1, Section 2 of the Constitution of the State of Illinois.

33. The agreement of defendants Lisle, Woodridge, and the County, embodied in the August 13, 1980 Order, discriminates against developers of property located within unincorporated DuPage County, such as Unity, in favor of developers of property located within Lisle and Woodridge. This discrimination is arbitrary, capricious, without rational basis and bears no relationship to any legitimate public purpose, and violates the right of Unity to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983, and under Article 1, Section 2 of the Constitution of the State of Illinois.

COUNT THREE

Substantive Due Process

1-31. Intervenor-Plaintiffs reallege paragraphs 1 through 31 both inclusive as paragraphs 1 through 31 of this Count Three.

32. The rights of Unity under its January 31, 1979 permit and its right to lawfully develop its property are rights protected and secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and by the Due Process Clause of Article 1, Section 2 of the Constitution of the State of Illinois.

33. The restriction of connections and the allocation of available connections agreed to by defendants and embodied in the August 13, 1980 Order is arbitrary, capricious, without rational basis and bears no relationship to any legitimate public purpose, and violates the right of Unity to substantive due process under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983, and under the Article 1, Section 2 of the Constitution of the State of Illinois.

COUNT FOUR

(In the Alternative)

Taking Property Without Compensation

34. The rights of Unity under its January 31, 1979 permit and its right to fully develop its property are property rights protected and secured by the Taking Clause of the Fourteenth Amendment to the Constitution of the United States and by Article 1, Section 15 of the Constitution of the State of Illinois.

35. The defendants' agreement embodied in the August 13, 1980 Order constitute a taking of Unity's property for a public purpose. Defendants' failure to compensate Unity for the loss of its property violates Unity's right to compensation under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983, and under the Article 1, Section 15 of the Constitution of the State of Illinois.

PRAYER FOR RELIEF

WHEREFORE, Unity prays as follows:

(a) That this Court declare that Unity's January 31, 1979 permit is in full force and effect as of the date of the filing of this amended complaint and shall remain in full force and effect for a reasonable time thereafter.

(b) That this Court declare that the Ordinance described in paragraph 27 is not applicable to Unity's January 31, 1979 permit or to the implementation of the rights granted by that permit, and that Unity shall not be required to make a prepayment of fees.

(c) That this Court issue a preliminary and permanent peliminary injunction enjoining DuPage County, Lisle, and Woodridge, and their Board members, trustees, officers, agents or representatives from taking any actions to hinder, delay, thwart, discourage or prevent Unity from exercising any rights it had under its January 31, 1979 permit.

(d) That this Court issue a Preliminary and Permanent Injunction prohibiting and enjoining the IEPA and the County from refusing to issue construction and connection and operating permits or from otherwise interfering with Unity's plans for development of the Hobson Greene project.

(e) That Unity recover compensatory damages in the amount of $20,000,000 or such greater or lesser amount as determined by a jury;

(f) That Unity recover punitive damages in such amount as determined by a jury;

(g) That Unity recover its costs and attorney fees in this suit; and

(h) That Unity have such further relief as the Court may deem just.

/s/ Alan Mills
One of the Attorneys for
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[Verification omitted in printing]

APPENDIX G

(Letterhead Of)

CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
Du Page County, Illinois

November 19, 1986

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Re: —79 MR 257—CORPORATE WEST DEVELOPMENT
vs. ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY
vs. UNITY VENTURES, ET AL

Dear Counsel:

This cause coming on to be heard upon the defendants' Motion to Dismiss pursuant to §2-619 of the Illinois Code of Civil Procedure; this Court having examined and considered the memoranda, briefs and arguments of the parties, the pleadings herein and the relevant authorities, and being fully advised in the premises, hereby FINDS:

The court has jurisdiction.

The Intervenors-Plaintiffs, Unity Ventures, et al. (hereafter Unity) were granted a two-year permit by the Illinois Environmental Protection Agency to correct sanitary sewer lines to the Lisle and Woodridge Sewage Treatment Plants. The date of the permit was January 31, 1979.

On August 13, 1980 this Court entered an order in this cause which allowed and allocated a limited number of new connections to the Lisle and Woodridge Plant.

Unity alleges in Paragraph 22 of its Amended Complaint that the Order of August 13, 1980 "had the effect of extinguishing" its rights in the 1979 permit.

Based upon the alleged extinguishment of its rights in the 1979 permit, Unity seeks damages for denial of procedural due process, substantive due process, equal protection under the law and unlawful taking.

It is clear from the pleadings, motions and documents submitted in this cause that Unity was never prohibited from exercising its rights under the 1979 permit to connect to the Lisle and Woodridge Plant. During the existence of the permit, Unity neither obtained a judicial or administrative judgment as to the status of the 1979 permit nor attempted to actually connect its sanitary system to the Lisle and Woodridge Plant.

Article VI, Section 9 of the Illinois Constitution of 1970 provides that "Circuit courts shall have original jurisdiction of all *justiciable* matters. . . ." (Emphasis added.)

Standing is an aspect of justiciability. (*Weihl v. Dixon*, (5th District 1977), 56 Ill. App. 3d 251, 371 N.E. 2d 883.) The doctrine of standing requires that a party seeking relief allege some injury in fact to a substantive, legally-protected interest. (*Lynch v. Devine* (3rd District 1977), 45 Ill. App. 3d 743, 359 N. E. 2d 1137.) The doctrine of standing is used to ensure that courts decide actual controversies and not abstract or moot issues.

Unity was never injured in fact in its rights under the 1979 permit because Unity was never actually refused the right to connect. In fact, during the existence of the permit, the structural work necessary to connect with the Lisle and Woodridge Plant had not even been started.

The 1979 permit expired on its own terms on January 31, 1981 extinguishing Unity's rights thereunder.

Unity was never injured in fact, no longer has rights in the 1979 permit which could presently be exercised, no justiciable issue and has no standing to bring this action.

The issue of standing being dispositive there is no reason to consider other arguments in support of the Motion to Dismiss.

The Motion to Dismiss under §2-619 of the Illinois Code of Civil Procedure is granted.

Mr. Ryan should prepare an Order consistent with this memorandum and present it to the Court on December 16, 1986 at 9:00 A.M. in Courtroom 302.

Very truly yours,

/s/ ANTHONY M. PECCARELLI
ANTHONY M. PECCARELLI
Circuit Judge

AMP/sk

G-4

[Filed December 16, 1986]

IN THE CIRCUIT COURT
FOR THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

CORPORATE WEST DEVELOPMENT, INC.,

Plaintiff,

v.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants,

v.

UNITY VENTURES, et al.,

Intervenors-Plaintiffs.

No. 79 MR 257—Anthony M. Peccarelli, Judge

JUDGMENT ORDER OF DISMISSAL

This cause comes on to be heard by the Court upon the Motion to Dismiss of the remaining defendants, the County of DuPage, Village of Lisle and Village of Woodridge, pursuant to §2-619 of the Illinois Code of Civil Procedure. This Court has examined and considered the memoranda, briefs and arguments (oral and written) of the parties, the pleadings and documents submitted herein, and relevant authorities, is fully advised in the premises, and hereby finds:

1. The Court has jurisdiction of the claims alleged in the Amended Complaint.

2. The Intervenors-Plaintiffs, Unity Ventures, et al. (hereafter "Unity") were granted a two-year permit by the Illinois Environmental Protection Agency ("IEPA") to construct and connect sanitary sewer lines to the Lisle and Woodridge Sewage Treatment Plant. The date of the permit was January 31, 1979.

3. On August 13, 1980, this Court entered an order in this cause which allowed and allocated a limited number of new connections to the Lisle and Woodridge Plant, after the IEPA had put such plant on restricted status, the effect of which was to prevent any new connections to such plant.

4. Unity alleges in Paragraph 22 of its Amended Complaint that the Order of August 13, 1980 "had the effect of extinguishing" its rights in the 1979 permit, and seeks damages therefor.

5. Unity was never prohibited from exercising its rights, under the 1979 permit, to construct and connect its sewer lines to the Lisle and Woodridge Plant by the August 13, 1980 Order of this Court or otherwise. During the existence of the permit, Unity neither obtained a judicial or administrative judgment as to the status of the 1979 permit, nor constructed and attempted to connect its sanitary system to the Lisle and Woodridge Plant.

6. Unity was never injured in fact in its rights under the 1979 permit because Unity was never actually refused the right to connect. In fact, during the existence of the permit, the structural work necessary to connect with the Lisle and Woodridge Plant, and permitted by its permit, had not even been started by Unity.

7. Unity's 1979 permit expired on its own terms on January 31, 1981, extinguishing Unity's rights thereunder.

8. For the foregoing reasons, Unity was never injured in fact; no justiciable issue is presented herein; Unity has no standing to bring this action.

Based on the foregoing findings,

IT IS HEREBY ORDERED THAT:

1. Defendants' Motion to Dismiss Unity's Amended Complaint, pursuant to §2-619 of the Illinois Code of Civil Procedure, is granted.

2. Judgment is hereby entered dismissing this action with prejudice.

ENTER:

/s/ ANTHONY M. PECCARELLI
Anthony M. Peccarelli
Circuit Judge

Dated: December 16, 1986

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LaSalle National Bank of Chicago, as Trustee under Trusts Numbered 40244, 53645, 100385 and 100386, Unity Ventures, and William Alter,

Plaintiffs,

v.

The County of DuPage, a body politic; The Board of Commissioners of DuPage County, a body politic; The Village of Lisle, a municipal corporation; and The Village of Woodridge, a municipal corporation,

Defendants.

No. 82 C 6517—Jury Trial Demanded
The Honorable Paul E. Plunkett, Judge Presiding

PLAINTIFFS' FIRST AMENDED COMPLAINT

Plaintiffs complain of the defendants and each of them as follows:

NATURE OF THE ACTION

1. Plaintiffs seek damages, and declaratory and injunctive relief because of defendants' continuing conspiracy to hinder, delay and prevent plaintiffs from development of their land in violation of plaintiffs' rights to procedural and substantive due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 1983, and Article 1, Section 2 of the Constitution of the State of Illinois. In the alternative, plaintiffs allege that defendants have unconstitutionally taken their property without compensation in violation of the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 1983, and Article 1, Section 15 of the Constitution of the State of Illinois.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331(a) and 28 U.S.C. § 1343 since this action arises under the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. § 1983. The Court has jurisdiction over plaintiffs' claims under the Constitution of the State of Illinois under the principles of pendant jurisdiction.

3. Venue is proper in this district since all defendants reside or are located within the Northern District of Illinois and the acts complained of herein occurred within the Northern District of Illinois.

THE PARTIES

Plaintiffs

4. Plaintiff LaSalle National Bank of Chicago is the legal title holder of approximately 145 acres of land (the "Greene Farm") located in an unincorporated section of DuPage County, as trustee under trust agreements numbered 40244, 53645, 100385 and 100386.

5. Plaintiff William Alter ("Alter") is a beneficiary of the land trusts described above. Alter is and has been

engaged in the development of the Greene Farm as a project known as the Hobson Greene Development ("Hobson Greene"), discussed in detail hereafter. Alter is also the managing partner of Unity Ventures described in the next paragraph.

6. Plaintiff Unity Ventures is an Illinois partnership with its principal place of business in Wilmette, Illinois. Its business activities include the development and management of the Hobson Greene Development. It is also a beneficiary of certain of the land trusts described in paragraph 4.[1]

Defendants

7. Defendant County of DuPage ("DuPage County") is a unit of local government and body politic, established and governed by the Constitution and laws of the State of Illinois.

8. Defendant Board of Commissioners of DuPage County ("the Commissioners") is a body of politic designated by statute to govern and administer the affairs of DuPage County.

9. Defendant Village of Lisle ("Lisle") is a municipal corporation and body politic of the State of Illinois located in DuPage County, Illinois.

10. Defendant Village of Woodridge ("Woodridge") is a municipal corporation and body politic of the State of Illinois located in DuPage County, Illinois.

THE PROPERTY

A. The Greene Area

11. The area surrounding Greene Farm in DuPage County is one of the areas in the Chicago metropolitan

[1] All plaintiffs are hereafter collectively described as "plaintiff" unless otherwise indicated.

area which is generally considered "desirable," and is thus an area where developers seek to build and market housing designed for upper income persons. This area consists of approximately 1,500 acres, bounded on the north by Maple Road, on the west by Naperville, on the south by the Greene Valley Forest Preserve, and on the east by Illinois Route 53. (This area is hereafter referred to as the "Greene Area"). Much of this area is located in the unincorporated section of DuPage County. The Villages of Lisle and Woodridge are located on the eastern edge of this area.

12. Prior to 1970, the Greene Area was an area of low population density and relatively low land values. Because the Greene Area was served by an existing network of roads, highways, and public transportation and because of its proximity to Chicago and other communities in the Chicago metropolitan region, the Greene Area was and is ideally suited for a luxury type development, as described above.

13. Beginning in approximately 1970, developers, including plaintiff, commenced to acquire farm and other developed and undeveloped real property in the Greene Area for luxury commercial and residential development.

B. The Hobson Greene Development

14. Plaintiff acquired the Greene Farm property in approximately 1969 in order to create Hobson Green, a development which, had it been completed according to plaintiff's original plans, would have consisted of approximately 268 single family homes, 713 dwelling units of multiple family housing, a commercial center of stores, large open and recreational spaces, and equestrian trail leading to a county forest preserve east of Hobson Greene.

15. The Greene Area which surrounds Hobson Greene is also largely unincorporated, consists of many large estates and is considered an extremely desirable and prestigious area. As more fully described hereafter, Woodridge

at all times pertinent hereto desired to annex Hobson Green into its corporate limits.

16. Because of the illegal conspiracy in violation of plaintiff's civil rights described hereafter, plaintiff has been unable to complete Hobson Greene.

17. In order to successfully complete a development such as Hobson Greene plaintiff had to obtain, among other things, appropriate zoning, water service, and sewer service to dispose of the sewage that the development would generate.

18. In the Greene Area, the County of DuPage and the Villages of Lisle and Woodridge control the zoning, water, and sewer services required by developers like plaintiff.

19. Various local governmental units in the Greene Area, including the defendants herein, compete with each other to provide certain profitable utility services, like water service, to new developments.

20. In addition, these units of local government compete with each other to annex certain developments which, if annexed to a particular municipality, would upgrade the public image and reputation of the municipality, increase the tax base of the municipality, and otherwise benefit the municipality.

21. At all times pertinent hereto, a developer of property located in the unincorporated part of the Greene Area would normally approach the County and one or more adjacent or nearby municipalities to determine the zoning, permit and annexation fees, land donations, and other requirements and benefits that each offers or requires of a developer located within its jurisdiction. A developer would then agree to annex his property to that municipality which offered the most attractive mix of benefits and requirements for annexation. However, if no municipality offers an attractive mix of benefits or requirements for annexation, the developer would then cause his development to remain in an unincorporated area of DuPage County.

DEFENDANTS' CONSPIRACY

22. Commencing in or about 1971 or prior thereto, defendants and each of them and other persons not charged herein entered into a conspiracy to deprive plaintiff of his constitutional right to develop his property in a lawful manner and to deprive plaintiff of his property without compensation. In order to effectuate this conspiracy defendants have embarked upon a series of illicit overt acts which have included, among others: arbitrary and capricious decision making, purposeful discrimination against plaintiff, and deprivation of plaintiff's property without due process of law. This conspiracy is continuing in nature.

23. In particular, and withou limitation, the defendants conspired and agreed to deprive plaintiff of his constitutional rights by the following means:

(a) In or about 1974, the defendants entered into an agreement to deny plaintiff the special use permit for which he had applied to the DuPage County Zoning Board of Appeals and without which plaintiff's proposed Hobson Greene development could not proceed. Defendants' actions singled plaintiff out for particularly oppressive treatment unrelated to the public health, safety, or welfare, or to any other legitimate governmental purpose.

(b) In or about 1978, defendants entered into a series of boundary agreements which set boundaries within which each local governmental unit was given the exclusive right to annex new development and to provide utility services to new developments. Woodridge subsequently used this power to refuse to provide water service to plaintiff after plaintiff refused to accede to Woodridge's discriminatory terms for annexation.

(c) Defendants unfairly allocated the available sewage capacity in the area among themselves. On August 13, 1980, the defendants cause this

agreement to be entered as an agreed order by the Circuit Court of DuPage County. Defendants gave no notice to plaintiff and provided plaintiff with no opportunity to be heard. The allocation agreed upon by defendants unlawfully discriminated against plaintiff.

24. The purpose, intent, and effect of defendants' conspiracy described above was and is to assure that plaintiff is unable to develop his property on reasonable terms. Rather, defendants seek to extort unreasonable concessions, not authorized by law, from plaintiff as a condition of allowing him to make legitimate use of his property.

OVERT ACTS

A. Conspiracy To Block Zoning For Hobson Greene

25. On May 18, 1970, plaintiff filed a petition with the DuPage County Zoning Board of Appeals which requested that a special use permit be granted for a planned unit development ("PUD") on a larger parcel which included the Greene Farm property and the property directly north of the Greene Farm property. This permit would have allowed plaintiff to proceed with the Hobson Greene Development, as described above.

26. Rather than approve or deny the PUD application as a whole, DuPage County split this development and, in an unprecedented and wholly unauthorized manner, approved the development of the northern property but denied plaintiff's application as it related to the Greene Farm property.

27. On December 24, 1974, the County Board approved denial of plaintiff's application as it related to the Greene Farm property. This constituted final action on plaintiff's application.

28. The County's actions were agreed to and done at the urging of defendants Woodridge and Lisle.

29. After three years of litigation, the Illinois Appellate Court held that the County's denial of the special use permit was improper, discriminatory, and not related to the public health, safety, or welfare. *LaSalle National Bank v. County of DuPage*, 54 Ill. App.3d 387, 369 N.E.2d 505 (2d Dist. 1977).

B. Woodridge's Refusal To Provide Water Service To Plaintiffs

30. In or about 1978, and possibly beginning at an earlier date, the defendants Lisle, Woodridge and other municipalities unknown to plaintiff at this time entered into a series of agreements whereby each municipality was assigned a particular territory within which it had the exclusive right to annex territory. Each defendant agreed not to annex any development or other property located in another local government's territory.

31. As a part of the allocation of territory for future annexation described above, the defendants agreed to respect these boundaries in regard to the provision of utility services. In particular, each municipality agreed not to provide water service to any property located within another unit's territory.

32. At some time prior to 1978, a water main was installed under Hobson Road, directly to the north of Hobson Greene. At that time, the stated purpose of that water main was to provide water services to Hobson Greene and to the development located on the north side of Hobson Road.

33. In 1978, William Alter approached the Village of Woodridge to request water service for the proposed Hobson Greene Development.

34. Service to the Hobson Greene Development would have been provided from the water main which runs under the Hobson Road. When this water main was installed, it was sized explicitly so that it would have sufficient capacity to serve *both* the Hobson Greene Development *and* the development to the north of Hobson Road.

35. Although Woodridge agreed to provide water service to the development north of Hobson Road, without demanding that the developer annex its property to Woodridge, Woodridge refused to provide such service to plaintiff unless plaintiff agreed to annex the Greene Farm property to Woodridge.

36. Woodridge demanded, as its terms for annexation, that plaintiff make numerous unreasonable and burdensome concessions. Similar concessions were not required of other similarly situated developers, including without limitation, the developer of the property north of Hobson Road.

37. Plaintiff refused to accede to Woodridge's unreasonable and discriminatory requests. Woodridge therefore refused to provide water serve to the Hobson Greene development.

38. Thereafter, Lisle refused to consider providing water service to the proposed development, because the property was located within Woodridge's territory. The County had no facilities available to provide plaintiff with water service.

39. As a result of defendants' refusal to provide water service to the Hobson Greene development, plaintiff was forced to rely on well water. In order to provide adequate water service to the residents who would occupy the Hobson Greene development using wells, plaintiff was forced to reduce the density of the development and provide homes on larger lots. Plaintiff had new plans, schematics, and similar documents prepared for his revised development plan. This revised plan called for Hobson Greene to be developed in three phases.

C. Defendants' Discriminatory, Arbitrary, And Capricious Allocation Of Sewage Treatment Capacity

40. In order to proceed with each phase of this proposed development, plaintiff is required to obtain approv-

al from the Illinois Environmental Protection Agency ("IEPA") and the County in order to construct the sanitary sewer lines and facilities needed to service that phase of the development.

41. Beginning in or about 1971, the County entered into agreements with Lisle and Woodridge whereby the County operated the Lisle-Woodridge sewage treatment plant.

42. These agreements also provided that, in the event the plant neared capacity, Lisle and Woodridge would be allocated a set number or proportion of sewage connections, regardless of demand and without regard to the number of proportion of permit holders located in the Village compared to permit holders located in the unincorporated portions of the County.

43. Pursuant to a permit issued on February 8, 1979 to plaintiff by the IEPA, the sanitary sewer lines and facilities have been constructed and installed for the first phase of Hobson Greene ("Unit One"). County building permits and connection permits have been obtained, and Unit One is approximately fifty percent completed.

44. On January 31, 1979, plaintiff was issued a permit by the IEPA ("the 1979 permit") to construct and connect sanitary sewer lines and facilities to service the second phase of Hobson Greene ("Unit Two"). County building permits and connection permits are required to construct buildings and connect their sanitary systems to the sewer lines and facilities in Unit Two. These latter permits have not been obtained as a result of the events described hereafter. Plaintiff has expended substantial funds in reliance on the 1979 permit; however, it has not commenced construction of the sanitary sewer lines and facilities for Unit Two.

45. Plaintiff has a property right in the 1979 permit which is protected by the Constitution of the State of Illinois and by the United States Constitution.

46. As a result of defendants' wrongful conduct described hereafter, plaintiff has not obtained permits for

construction and connection of sanitary sewer lines and facilities to service the third phase of Hobson Greene ("Unit Three").

47. On May 30, 1979, the IEPA placed the Lisle–Woodridge plants on restricted status pursuant to the IEPA's allegation that the plant was operating dangerously close to capacity. Subsequently, the IEPA sought to stop any further sanitary sewer connections to said treatment facility.

48. The IEPA's request, if granted, would have effectively extinguished all of plaintiff's rights under its January 31, 1979 permit.[2]

49. The IEPA and the defendants had actual knowledge of plaintiff's January 31, 1979 permit, and had actual knowledge of plaintiff's address.

50. After the instant action was filed, the defendants entered into an extended period of negotiation among and between themselves and with the IEPA regarding the number of sanitary sewage connections to the Lisle–Woodridge plant that would be allowed.

51. The IEPA, Lisle, Woodridge, and the County eventually agreed upon a certain formula for determining the number of connections which would be allowed.

52. Subsequent to that agreement, Lisle, Woodridge, and the County agreed among themselves, without the participation of the IEPA, to allocate the available connections among and between themselves. Said agreements allocated a disproportionate share of the available connections to developments located within Lisle and Woodridge at the expense of developments, such as that proposed by plaintiffs, located in unincorporated DuPage County. This allocation discriminated against plaintiff and other

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[2] The permit for Unit I was not affected as construction had commenced on the sanitary sewer lines and facilities for Unit One prior to the IEPA's action.

developers of property located in unincorporated portions of the County. Thid discriminatory allocation was not rationally related to any legitimate government purpose.

53. That is, prior to May 30, 1979, plaintiff held valid permits which amounted to approximately 60 percent of the total number of valid outstanding permits which had been issued. After defendants allocated the remaining capacity, all of the developers of property located within unincorporated portions of the County, including plaintiff, were allowed to use approximately 25 percent of all available permits.

54. On August 13, 1980, pursuant to a stipulation entered into by the IEPA, Lisle, Woodridge and the County, the Circuit Court of DuPage County entered an order in *Corporate West, Inc. v. IEPA, et al.*, No. 79 MR 257. This order, in substance, embodies the agreements described above in paragraphs 50 through 53.

55. This Order had the effect of extinguishing plaintiff's rights under the 1979 permit and had the effect of preventing plaintiff's lawful development of Hobson Greene.

56. At no time prior to August 13, 1980, would the connection of the Unit Two sanitary sewer lines and facilities to the affected facilities have presented any damage to the health and safety of the area residents nor would it have had any adverse impact on water quality.

57. Plaintiff was not a party to *Corporate West, Inc. v. IEPA, et al.*, No. 79 MR 257. Plaintiff received no notice of the pendency of the case, had no opportunity to participate in the defendants' negotiations, nor did it receive notice or have an opportunity to be heard prior to the entry of the August 13, 1980 order.

DAMAGE TO PLAINTIFF

Damage To All Units

58. As a result of the conspiracy complained of herein, plaintiff has been unable to develop his property as orig-

inally contemplated. The defendants' actions have forced plaintiff to substantially redesign the Hobson Greene Development with the result that the development will be substantially less profitable. Additionally, defendants' actions have caused significant delay in plaintiff's developments of the Green Farm property thereby substantially increasing the cost of the Hobson Greene Development and jeopardized the development entirely.

59. In particular and without limitation, plaintiff has been damaged in the following manner:

(a) The delay caused by the County Board's arbitrary and capricious denial of plaintiff's petition for a special use permit, described in paragraphs above, has caused plaintiff to delay his development for three years, and to incur substantial attorneys fees.

(b) Defendant Village of Woodridge's wrongful refusal to provide the Greene Farm property with water service, described in paragraphs above, forced plaintiff to substantially decrease the density of the proposed Hobson Greene Development, thereby greatly reducing the potential profitability of the development project.

Damage to Unit Two

60. As a result of the August 12, 1980 Order, plaintiff has been unable to begin construction of the sewer lines and facilities for Unit Two, and thus has been unable to proceed with the second phase of the Hobson Greene development.

61. As a result of its inability to begin said construction, the 1979 permit expired on January 31, 1981.

Damage to Units Two and Three

62. After plaintiff obtained the 1979 permit, the County enacted a new ordinance ("the Ordinance") which requires all applicants for sewer permits like that obtained by

plaintiff on January 31, 1979, to pay all connection charges prior to applying for construction permits. The prior ordinance in effect on August 13, 1979 required payment of the permit fees only at the time of application. The connection fee (by far the larger sum) was not required until the time of connection. In addition, the ordinance increased the total permit and connection fee.

63. As a result of defendants' actions described herein, plaintiff must pay an additional $760,000.00 in order to obtain a permit which would give it rights equivalent to his rights under the 1979 permit.

64. The newly completed Green Valley plant is likely to be operating at or near capacity before plaintiff can connect to the plant because of connections by persons who presently hold permits or who will obtain permits prior to the date on which plaintiff will be able to obtain a new permit. As a result, plaintiff may be unable to use the new Green Valley plant and he will thus continue to be prevented from developing Units Two and Three.

Damage to Unit Three

65. As a result of the August 13, 1980 Order, plaintiff is unable to obtain a permit authorizing construction of sewer lines and facilities for Unit Three, and has thus been unable to proceed with the third phase of the Hobson Greene Development.

COUNT ONE

Procedural Due Process

1-65. Plaintiff realleges paragraphs 1 through 65 both inclusive, as paragraphs 1 through 65 of this Count One.

66. The rights of plaintiff under the 1979 permit and his right to lawfully develop his property are rights protected and secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and by the Due Process Clause of Article 1, Section 2 of the Constitution of the State of Illinois.

67. Defendants' failure to provide plaintiff with notice and an opportunity to be heard prior to entry of the August 13, 1980 Order violates plaintiff's rights to procedural due process under the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. §1983, and Article 1, Section 2 of the Constitution of the State of Illinois.

COUNT TWO

Equal Protection

1-65. Plaintiff realleges paragraphs 1 through 65 both inclusive, as paragraphs 1 through 65 of this Count Two.

66. The rights of plaintiff under the 1979 permit and his right to lawfully develop his property are rights protected and secured by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Equal Protection Clause of Article 1, Section 2 of the Constitution of the State of Illinois.

67. Defendants' refusal to approve a PUD for Hobson Greene while approving the PUD for the development north of Hobson Road, refusal to provide water service to Hobson Greene while providing water service to the development north of Hobson Road, and the agreement of defendants Lisle, Woodridge and the County, embodied in the August 13, 1980 Order, to allocate a disproportionately small part of the available sewage treatment capacity for the use of developers of property located within the unincorporated portion of DuPage County such as plaintiff while allocating a disproportionately large part of this capacity for the use of developers of property located within Lisle and Woodridge constitutes arbitrary and capricious discrimination which is not rationally related to any legitimate public purpose in violation of the right of plaintiff to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. §1983, and Article 1, Section 2 of the Constitution of the State of Illinois.

COUNT THREE

Substantive Due Process

1-65. Plaintiff realleges paragraphs 1 through 65, both inclusive, as paragraphs 1 through 65 of this Count Three.

66. The rights of plaintiff under the 1979 permit and his right to lawfully develop his property are rights protected and secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and by the Due Process Clause of Article 1, Section 2 of the Constitution of the State of Illinois.

67. Defendants' refusal to approve a PUD for Hobson Greene while approving the PUD for the development north of Hobson Road, refusal to provide water service to Hobson Greene while providing water service to the development north of Hobson Road, and the agreement of defendants Lisle, Woodridge and the County, embodied in the August 13, 1980 Order, to allocate a disproportionately small part of the available sewage treatment capacity for the use of developers of property located within the unincorporated portion of DuPage County such as plaintiff while allocating a disproportionately large part of this capacity for the use of developers of property located within Lisle and Woodridge constitutes arbitrary and capricious action which is not rationally related to any legitimate public purpose in violation of plaintiff's right to substantive due process under the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. §1983, and Article 1, Section 2 of the Constitution of the State of Illinois.

COUNT FOUR

(In the Alternative)

Taking Property Without Compensation

1-65. Plaintiff realleges paragraphs 1 through 65, both inclusive, as paragraphs 1 through 65 of this Count Four.

66. The rights of plaintiff under the 1979 permit and his right to lawfully develop his property are property rights protected and secured by the Taking Clause of the Fourteenth Amendment to the Constitution of the United States and by Article 1, Section 15 of the Constitution of the State of Illinois.

67. Defendants' refusal to approve a PUD for Hobson Greene while approving the PUD for the development north of Hobson Road, refusal to provide water service to Hobson Greene while providing water service to the development north of Hobson Road, and the agreement of defendants Lisle, Woodridge and the County, embodied in the August 13, 1980 Order, to allocate a disproportionately small part of the available sewage treatment capacity for the use of developers of property located within the unincorporated portion of DuPage County such as plaintiff while allocating a disproportionately large part of this capacity for the use of developers of property located within Lisle and Woodridge effectively deprives plaintiff of all economically viable use of his property. Defendants' failure to compensate plaintiff for the loss of his property violates plaintiff's right to compensation under the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. §1983, and the Article 1, Section 15 of the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays as follows:

(a) That this Court declare that plaintiff's January 31, 1979 permit is full force and effect as of the date of the filing of this amended complaint and shall remain in full force and effect for a reasonable time thereafter.

(b) That this Court declare that the Ordinance described in paragraph 62 is not applicable to plaintiff's January 31, 1979 permit or to the implementation of the rights granted by that permit, and that plaintiff shall not be required to make a prepayment of fees or pay the increased fee provided for in that Ordinance.

(c) That this Court issue a preliminary and permanent injunction enjoining DuPage County, Lisle, Woodridge, and their Board members, trustees, officers, agents or representatives from hindering or delaying plaintiff from exercising any rights under the 1979 permit.

(d) That this Court issue a Preliminary and Permanent Injunction prohibiting and enjoining the County from refusing to issue construction, connection, and operating permits or from otherwise interfering with plaintiff's plans for the development of the Hobson Greene project.

(e) That plaintiff recover compensatory damages in the amount of $20,000,000.00 or such greater or lesser amount as determined by a jury;

(f) That plaintiff recover his costs and attorney fees in this suit; and

(g) That plaintiff have such further relief as the Court may deem just.

_____

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(2)

No. 88-1258

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE COUNTY OF DUPAGE, THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, THE VILLAGE OF LISLE, and THE VILLAGE OF WOODRIDGE,

Petitioners,

v.

LASALLE NATIONAL BANK OF CHICAGO, UNITY VENTURES, and WILLIAM ALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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No. 88-1258

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners ("defendants") seek to have this Court consider the holding of the United States Court of Appeals

for the Seventh Circuit[1] that plaintiffs' constitutional claims in this case are not barred, under the Illinois rules of *res judicata*, by a judgment entered against plaintiffs in a state court action. Respondents ("plaintiffs") respectfully submit that this is purely a question of state law and involves no federal question which would merit this Court's attention.

Plaintiffs allege that beginning in 1973 and continuing to at least 1984, defendants engaged in a conspiracy and continuing course of conduct which had as its object depriving plaintiffs of their constitutionally protected right to make reasonable use of their property. While plaintiffs' underlying claims involve fundamental constitutional questions regarding the limits on proper governmental regulation of private property, the issue defendants ask the Court to consider in the instant petition for certiorari is a narrow procedural question: whether the federal constitutional claims plaintiffs assert in the instant action are barred, under the principle of *res judicata*, by a final judg-

[1] The opinion which defendants ask this Court to review is *LaSalle National Bank of Chicago v. County of DuPage*, 856 F.2d 925 (7th Cir. 1988) (sometimes referred to herein as "*LaSalle* III"). This case was before the Seventh Circuit on two previous occasions. In *LaSalle National Bank of Chicago v. County of DuPage*, 777 F.2d 377 (7th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986), ("*LaSalle* I") the court held that defendants were immune from plaintiffs' claims under Section One of the Sherman Anti-Trust Act because of the "State Action Immunity" doctrine. In an unreported decision dated September 19, 1986 ("*LaSalle* II") the court held that its mandate in *LaSalle* I was not intended to preclude plaintiffs from amending their complaint to assert a claim under the civil rights laws.

ment entered in a state court case[2] which involved one of the many overt acts performed by defendants in furtherance of their unconstitutional conspiracy which is the subject of the instant case.

In *LaSalle* III, the United States Court of Appeals for the Seventh Circuit, applying the now firmly established holding of *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), looked to the law of Illinois and concluded that, because the "factual undergirding" of plaintiffs' claims in the instant case and in *Corporate West* were "quite dissimilar", the judgment in *Corporate West* did not, under Illinois law, bar plaintiffs' claims in the instant case (856 F.2d at 933; Def. App. A-16).

In an attempt to transform what is obviously a question of state law into a "federal question" allegedly worthy of the attention of this Court, defendants mischaracterize the facts in the record and distort the procedural history of this case and of *Corporate West*. Without attempting a full recitation of the complex factual and procedural background of this case which is set forth in full in *LaSalle* I and *LaSalle* III, plaintiffs will briefly highlight those facts and proceedings which are directly relevant to the issues defendants raise in the instant petition.

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[2] *Corporate West Development Corporation v. Illinois Environmental Protection Agency*, No. 79 MR 257 in the Circuit Court of DuPage County, Illinois, Eighteenth Judicial Circuit. As is set forth below, plaintiffs did not initiate this state court case; rather, they intervened in a case begun by an unrelated corporation, Corporate West Development, Inc. Thus, plaintiffs' name does not appear in the caption of that case. For the sake of clarity, the case is referred to as "*Corporate West*" (in italics) while the corporate plaintiff is referred to as "Corporate West Development, Inc." (without italics).

A. Facts

In 1969, plaintiffs acquired approximately 145 acres of undeveloped farm land located in an unincorporated portion of the County of DuPage ("the County") near the western borders of the Villages of Lisle ("Lisle") and Woodridge ("Woodridge"). Plaintiffs' original plans called for development of the property with approximately 268 single family homes, 713 dwelling units of multiple family housing, a commercial center of stores, large open and recreational spaces, and equestrian trails leading to a county forest preserve east of the Greene Farm (plaintiffs' proposed development is sometimes referred to in this brief as "Hobson Greene").

In order to successfully complete Hobson Greene, plaintiffs, like any other property owner, had to arrange for a series of prerequisites, including: (1) zoning which would allow use of the property as proposed in the development plan; (2) water service to provide water for the residents of the development; and (3) a sewage treatment system for disposal of the waste generated by the residents of the development. Each of these prerequisites was subject to the control of one or more of the defendants. Through their concerted action, respondents denied plaintiffs the zoning, sewage, and water essential for their development.

Zoning: In 1970 plaintiffs sought from the County the special use zoning permit essential for their planned development. The permit was granted for one portion of the planned development, but not for plaintiffs' portion. Plaintiffs sought relief in the state courts. The state circuit court found the denial of the permit to be a violation of the Illinois Constitution as well as arbitrary and capricious, and, after seven years of litigation, the decision was upheld on appeal. *LaSalle National Bank v. County of*

DuPage, 54 Ill. App. 3d 387, 369 N.E.2d 505 (2nd Dist. 1977).

Water: In 1978, after plaintiffs finally obtained the needed zoning from the state courts, plaintiffs approached Woodridge to obtain water for the development. However, Woodridge refused to provide water unless plaintiffs agreed to annex the development to Woodridge upon wholly unreasonable terms which bore no reasonable relationship to the costs or burdens of the development. Plaintiffs also approached neighboring Lisle about water; however, Lisle refused to deal with the plaintiffs because the unincorporated land in question had purportedly been allocated to Woodridge under a 1978 agreement between Lisle and Woodridge. As a result of their inability to obtain access to a public water supply, plaintiffs were forced to completely redesign their project and rely upon well water.

Sewer: In early 1979, plaintiffs obtained permits from the Illinois Environmental Protection Agency ("IEPA") for the first two phases of their development (as redesigned) which gave them the right to construct and operate a system of sewage pipes on their property to be connected to a sewage treatment plant operated by the County.

On May 30, 1979, the IEPA placed the Lisle-Woodridge plant on "restricted status"; that is, the IEPA indicated that it would not issue any *new* permits for use of the plant. The IEPA's action, taken alone, would have had no effect on the first two phases of Hobson Greene, as plaintiffs already had valid permits for these phases of the development.

In July, 1979, Corporate West Development, Inc., a developer (unrelated to plaintiffs) of property in DuPage

County, filed an action challenging the IEPA's "restricted status" determination. Defendants quickly settled with Corporate West Development, Inc. and granted it the permit it needed for its development. In the meantime, on September 26, 1979, the IEPA filed a counterclaim in *Corporate West* seeking an injunction which would have the effect of blocking plaintiffs' development. That is, the IEPA sought an order enjoining the County, Lisle, and Woodridge from issuing *any* building permits or connection permits in the area served by the plant, including issuing building or connection permits to developers like plaintiffs which held existing valid IEPA permits. Neither defendants nor the IEPA joined plaintiffs as parties nor did they otherwise give plaintiffs any notice of the proceedings in *Corporate West.*

After an extended period of negotiations, the IEPA, Lisle, Woodridge, and the County agreed upon a certain formula which allowed a limited number of connections by existing permit holders. On August 13, 1980, pursuant to a stipulation entered into by the IEPA, Lisle, Woodridge and the County, defendants caused an order to be entered in *Corporate West* which embodied the discriminatory allocation described above and which enjoined the County from issuing building permits or connection permits to any developer unable to obtain sewage service under the allocation formula, *regardless* of existing valid permits. This Order had the effect of extinguishing plaintiffs' vested rights under their IEPA permits and had the effect of preventing plaintiffs' lawful development of their property.

When plaintiffs learned of the entry of the August 13, 1980 Order in *Corporate West*, they immediately sought (and were granted) leave to intervene and sought to vacate the August 13, 1980 Order as unconstitutional. In

1984, plaintiffs dropped their claim for prospective relief, substituting a claim for damages. In both their original complaint *and* in their 1984 amended complaint, plaintiffs specifically limited their claims in *Corporate West* to the events surrounding entry of the August 13, 1980 Order. Plaintiffs never made any attempt to bring defendants' fifteen year conspiracy or any of defendants' actions relating to zoning and water before the court in *Corporate West.*

In December, 1986, the Circuit Court of DuPage County entered a final judgment in *Corporate West*, finding that plaintiffs lacked standing to challenge the constitutionality of the August 13, 1980 Order.

B. Course Of Proceedings In The Instant Case

During the course of discovery in *Corporate West*, plaintiffs discovered facts from which they concluded that what appeared to be unrelated incidents (zoning, water, sewer) were in fact part of a continuing course of conduct by defendants aimed at blocking plaintiffs' proposed development.

As a result, on October 25, 1982, while they continued their attempt in state court to obtain relief from the August 13 Order in *Corporate West*, plaintiffs filed the instant case in federal court. In contrast to the narrow scope of their complaint in *Corporate West*, plaintiffs' complaint in this case included the entire range of defendants' fifteen year conspiracy, including zoning, water, and sewer. Plaintiffs' initial complaint in this case asserted an antitrust conspiracy. However, the Seventh Circuit held (777 F. 2d 377) that plaintiffs' antitrust claims were barred by the state action immunity doctrine. Following this Court's denial of certiorari (476 U.S. 1170), plaintiffs sought leave

to amend their complaint to assert a civil rights theory. On April 1, 1987, following another appeal to the Seventh Circuit (the order clarifying the court's earlier mandate is unreported), plaintiffs were permitted to file the amended complaint which is the subject of the instant petition. On July 31, 1987, the district court granted defendants' Rule 12(b)(6) motion to dismiss plaintiffs' amended complaint, holding that plaintiffs' claims were barred under the principle of *res judicata* by the final judgment entered in *Corporate West.*

On September 8, 1988, the Seventh Circuit reversed. *LaSalle National Bank of Chicago v. County of DuPage,* 856 F. 2d 925 (7th Cir. 1988). The court initially noted (856 F. 2d at 931-33) that the law of *res judicata* in Illinois was confused and that Illinois courts appeared to apply two different tests interchangeably and without appearing to recognize that the tests were at times inconsistent. However, the court ultimately concluded (856 F. 2d at 933-34) that it need not resolve this ambiguity in the Illinois cases, because plaintiffs' claims in the instant case clearly were not barred by the judgment in *Corporate West, regardless of which Illinois test was applied.* On October 24, 1988, the Seventh Circuit denied defendants' petition for rehearing and rehearing *in banc.*

On October 31, 1988, defendants filed a motion to stay issuance of the court's mandate, on the ground that they intended to file a petition for certiorari. On November 4, 1988, in a highly unusual and extraordinarily decisive order, the Seventh Circuit flatly rejected defendants' request (Pl. App. A-1):

> This case raises no novel question requiring further review in the Supreme Court of the United States. It is simply a fact specific application of principles already established by the Supreme Court and ap-

plied previously by this circuit. Therefore, it is not probable that four Justices of the Supreme Court will vote to grant certiorari in this case. Nor is there a substantial possibility that, if certiorari were granted, the judgment of this court would be reversed.

SUMMARY OF ARGUMENT

Plaintiffs fully concur with the sentiment expressed by the Seventh Circuit in its order of November 4, 1988, quoted in the previous section. This case presents no unresolved issues of federal law; there is no conflict between the Circuit Courts of Appeal; the case involves no question of national importance. This case involves nothing more than a fact specific application of the *res judicata* law of Illinois[3] and is thus not appropriate for consideration by this Court.

Defendants' petition makes a valiant (though completely unsuccessful) attempt to create a federal question out of this state law issue. However, defendants are able to "find" a federal issue only by (1) distorting beyond recognition Justice Burger's concurring opinion in *Marrese*; seizing hold of the Seventh Circuit's *comment* bemoaning the fact that Illinois courts have used two different tests

[3] Perhaps the best evidence that this case involves only state law is the fact that of the 21 cases listed in defendants' "Table of Authorities", seven are cases from the Illinois courts applying the state law of *res judicata* and seven others are Seventh Circuit cases applying the Illinois law of *res judicata*. Of the remaining seven cases, one is *Marrese* and two are the prior decisions in this case.

to decide whether to apply *res judicata*, while ignoring the Seventh Circuit's *holding* that this ambiguity in Illinois law is irrelevant in *this* case, because plaintiffs' claims could not be barred by the *Corporate West* judgment under *either* test; and (3) suggesting a federal *res judicata* rule which would defeat the very purpose of federal civil rights laws—to give plaintiffs a *federal* forum to challenge unconstitutional abuse of power by local officials.

Plaintiffs submit that this case is simply not one which, by any stretch of the imagination, could be considered appropriate for review by this Court.

ARGUMENT

I.

THIS CASE DOES NOT INVOLVE ANY UNRESOLVED ISSUE OF FEDERAL LAW.

In *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), this Court held unanimously that the full faith and credit statute, 28 U.S.C. §1738, mandates that federal courts look to state law to determine the preclusive effect of a judgment rendered in state court. In the instant case, defendants claimed that the judgment entered in *Corporate West* by an Illinois court precludes plaintiffs from pursuing their claims in this case. Applying the clear and unambiguous direction of *Marrese*, the Seventh Circuit looked to the law of Illinois and determined that plaintiffs' claims were not barred by the judgment in *Corporate West*.

Marrese's direction is clear and unambiguous. No subsequent opinion has suggested that any member of the Court believes *Marrese* was wrongly decided. No Circuit Court of Appeals has suggested that *Marrese* ought to be reversed or is in any way vague or needs to be clarified. There is no division among the Circuits on the proper interpretation of *Marrese*.

Thus, the only federal question in this case—what preclusive effect a federal court should give to a final judgment rendered by a state court—was decided three years ago in *Marrese*. The only real question in this case is a question of state law—that is, how to apply the Illinois *res judicata* rules to the particular facts in this case. There is simply no reason for this Court to delve into the interstices of the Illinois law of *res judicata*.

II.

DEFENDANTS' ATTEMPT TO CREATE A FEDERAL QUESTION OF LAW FROM WHAT IS PURELY A QUESTION OF STATE LAW IS WHOLLY UNCONVINCING.

In an attempt to avoid the clear holding of *Marrese*, defendants seize upon the concurring opinion of Justice Burger (470 U.S. at 387) where, in a wholly different context, he suggested that *if* state law did not provide an answer to a preclusion question, then the federal courts might be free to fashion their own rule of preclusion. Regardless of the merits of Justice Burger's suggestion, his suggested rule clearly does *not* apply to *this* case. This is *not* the case Justice Burger envisioned nor is the Illinois law of *res judicata* ambiguous as applied to this case.

A. The Instant Case Does Not Present The Type Of Jurisdictional Competency Issue Envisioned By Justice Burger.

Marrese involved the difficult question of whether a state court judgment could act as a bar to plaintiffs' federal antitrust claim, even though plaintiffs *could not* have brought a federal antitrust claim in state court, because the federal courts have exclusive jurisdiction. Justice Burger agreed with the Court that the federal courts must look to state law to answer that question (470 U.S. at 387-88):

> In the circumstances presented by this case, a fair reading of §1738 requires federal courts to look first to general principles of state preclusion law. Those principles control if they clearly establish that the state court judgment does not bar the later federal action: Only recently we reaffirmed in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984), that a federal court is not free to accord greater preclusive effect to a state court judgment than the state court themselves would give it.

However, Justice Burger's concurrence went further than the majority opinion and noted that, because of the peculiar nature of the jurisdictional question presented in *Marrese*, it was likely that state law would *not* provide any answer. That is, state courts are typically courts of general jurisdiction. Thus, Justice Burger considered it probable that the state courts would never have occasion to consider the question of what preclusive effect should be given to a judgment entered by a court of *limited* jurisdiction (470 U.S. at 390). Justice Burger then went on to suggest that in these *limited* circumstances, "a federal rule might be fashioned" (470 U.S. at 390).

Whether or not the hypothetical situation described by Justice Burger will ever come to pass, the instant case is clearly *not* the case Justice Burger envisioned. The instant case does *not* involve a jurisdictional question alien to state court experience. Rather, the instant case involves a straightforward question of how closely the facts of two cases must overlap before *res judicata* bars the second case. This issue has been addressed literally hundreds of times by the courts of Illinois. In fact, to the extent the Seventh Circuit found any ambiguity in state law (a point discussed in the following section), that ambiguity was caused by the fact that there were *too many* Illinois decisions on the question—not all of which were consistent. This is exacly the *reverse* of the scenario envisioned by Justice Burger, where the state courts may not have had *any* occasion to consider an issue.

This distinction is crucial to the validity of Justice Burger's argument. Justice Burger was willing to impose a federal rule *only* where the state's interest was minimal—that is, where the state courts would never have occasion to consider the issue (470 U.S. at 390). In contrast, to apply Justice Burger's rule to the instant case (as suggested by defendants), would permit the federal courts to supplant state law whenever there was any lack of uniformity among the state decisions—regardless of how many times the state courts had grappled with the issue. Such an unforgiving rule, which would allow federal courts to ignore state law whenever there was any inconsistency in state court opinions, would completely undermine the principle of state primacy established by the full faith and credit statute, 28 U.S.C. §1738.

Justice Burger's opinion does not provide an excuse for such a sweeping intrusion into the state law of preclusion. His concurring opinion simply does not apply to the quite different facts of the instant case.

B. In Any Event, There Is No Ambiguity In The State Law Of Res Judicata, At Least As It Applies To This Case.

Not only do defendants seize upon Justice Burger's concurrence and stretch it far beyond Justice Burger's intent, defendants similarly seize upon a comment made by the Seventh Circuit to establish an alleged "ambiguity" in state law.

As noted by defendants, the Seventh Circuit bemoans the complexities of the Illinois rules governing *res judicata* created by the fact that the courts of Illinois have applied two different tests (the "evidence" and the "transactional" test) without recognizing that these tests may yield contradictory results in some cases (856 F. 2d at 930; Def. App. A-11). Defendants seize upon this inconsistency to argue that Justice Burger's "ambiguity" rule applies to this case.

Defendants are wrong. While the Seventh Circuit noted that the two Illinois tests might, in *some* cases, lead to different results, the Seventh Circuit concluded that *this* case was easy because, under *either* test, the judgment in *Corporate West* would not bar plaintiffs' claims. The Seventh Circuit unambiguously concluded (856 F. 2d at 933):

> Thus, under the evidence test, these are two different causes of action. Under the "transactional" approach the same result obtains. The two suits do not arise "from the same transaction, incident, or factual situation . . ."[4]

[4] This holding suggests that even under the broader "same transaction or occurrence" test applied under federal law, the judgment in *Corporate West* would not bar plaintiffs' claims in the instant case.

In other words, while there may be *some* case for which the Illinois law of preclusion would not provide an unambiguous answer, this is not that case.

III.

EVEN IF FEDERAL CLAIM PRECLUSION RULES WERE APPLIED, PLAINTIFFS' CLAIMS WOULD NOT BE BARRED.

Defendants' brief is littered with disparaging references to plaintiffs' alleged "claim splitting" and to plaintiffs' other allegedly abusive and reprehensible tactics. From this litany of alleged misconduct, defendants would have this Court conclude that plaintiffs clearly "ought" to be barred from pursuing their claims in this case.

Plaintiffs respectfully urge the Court to ignore defendants' hyperbole and to instead focus on what actually happened in this case. Plaintiffs did not "choose"—in any meaningful sense of the word—to participate in *Corporate West*. Plaintiffs did not initiate *Corporate West*. They sought to intervene only *after* defendants *used Corporate West* as a vehicle to accomplish their illicit goal of blocking plaintiffs' development by causing the August 13, 1980 Order to be entered by agreement.

While plaintiffs were forced to intervene in *Corporate West* for the limited purpose of obtaining relief from the Order,[5] plaintiffs have, from the beginning, chosen to bring their conspiracy claims in *federal* court (initially under the antitrust laws and, when that claim was foreclosed under the "state action immunity" doctrine, under

[5] Relief plaintiffs could *not* have obtained in federal court because of the anti-injunction act, 28 U.S.C. 1341.

the civil rights laws). Plaintiffs submit that their choice of the federal courts was fully consistent with the intent of Congress in enacting the civil rights laws and that defendants' *res judicata* rule—if adopted by this Court—would be a complete perversion of the principles underlying Section 1983, which was enacted *precisely* to provide plaintiffs with a *federal* forum in which to litigate this federal constitutional claim. *McNeese v. Board of Education for School District 187, Cahokia, Illinois*, 272 U.S. 668, 672 (1963).

According to defendants, plaintiffs erred by not including the full range of their federal claims in their amended complaint in *Corporate West*, filed in July, 1984. However, by July, 1984, plaintiffs had already asserted their broader conspiracy claims in this case. Plaintiffs have always wanted, and continue to want, to adjudicate their federal civil rights conspiracy claims in *federal* court.

Plaintiffs did not "choose" to bring *any* claim in *Corporate West*. Plaintiffs intervened in *Corporate West* only after *defendants* caused an order to be entered in that case which violated plaintiffs' rights. Plaintiffs' intervention in *Corporate West* was always limited and focused exclusively on obtaining relief from that order.

Thus, if defendants' version of *res judicata* were accepted, plaintiffs would have been faced with the untenable choice of either foregoing all opportunity to obtain relief from the illicit *Corporate West* order or foregoing their right to choose a federal forum for their federal claims. The Congress which enacted Section 1983 did not intend to impose such a dilemma on victims of civil rights abuses and the rules of *res judicata* do not require this result.

Plaintiffs properly sought limited relief in state court from one particular wrongful act committed by defendants in the course of their conspiracy while consistently pursuing their broad conspiracy claim in federal court. The principles of *res judicata* do not require that plaintiffs do otherwise.

IV.

THE WRIT SHOULD BE DENIED BECAUSE THE ISSUE PRESENTED IS UNNECESSARY TO THE ULTIMATE RESOLUTION OF THE CASE: DEFENDANTS WILL LIKELY LOSE ON OTHER GROUNDS.

In addition to the question of whether *Corporate West* and the instant case would be considered "for the same cause" under Illinois law, the Seventh Circuit was also faced with the question of whether the judgment in *Corporate West* constituted a decision on the merits. The trial court in *Corporate West* held that plaintiffs did not have standing to assert their claims in that case. The general rule in Illinois is that a decision based on standing does not constitute a decision on the merits. See, *e.g.*, *People ex rel. Scott v. Chicago Park District*, 66 Ill. 2d 65, 360 N.E.2d 773, 776 (1976).

The Seventh Circuit was able to avoid addressing this question because it found that the cases were not "for the same cause" (856 F. 2d at 931, n.4; Pl. App. A-12). However, before this Court could reach this issue presented by defendants' petition—the preclusive effect of the *Corporate West* judgment—the Court would have to first grapple with the question of whether the state court judgment was "on the merits". This Court has often refused to consider cases when resolution of the federal question presented is dependent upon other unresolved questions

in the record. Cf. *Belcher v. Stengel*, 429 U.S. 118, 119-120 (1976).

In other words, in addition to the fact that this case involves no substantial question of federal law which warrants this Court's attention, even the question defendants purport to find is not squarely presented. This provides yet another reason why defendants' petition should be denied.

CONCLUSION

For all of the reasons stated herein, plaintiffs respectfully request that the Court deny defendants' Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 88-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE COUNTY OF DUPAGE, THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, THE VILLAGE OF LISLE, and THE VILLAGE OF WOODRIDGE,

Petitioners,

v.

LASALLE NATIONAL BANK OF CHICAGO, UNITY VENTURES, and WILLIAM ALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

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No. 88-1258

IN THE

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OCTOBER TERM, 1988

THE COUNTY OF DUPAGE, THE BOARD OF COMMISSIONERS OF DUPAGE COUNTY, THE VILLAGE OF LISLE, and THE VILLAGE OF WOODRIDGE,

Petitioners,

v.

LASALLE NATIONAL BANK OF CHICAGO, UNITY VENTURES, and WILLIAM ALTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY BRIEF

Plaintiffs base their "Respondents' Brief In Opposition" on the following assertions:

(1) That defendants' Petition does not identify a federal question and seeks to undermine a case of unquestioned validity, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985);

(2) That plaintiffs were unwilling participants in the *Corporate West* state court proceedings;

(3) That plaintiffs litigated in that case only to the limited extent necessary to obtain relief from the August 13, 1980 state court order, allocating new sewer hookups;

(4) That those state court proceedings led to a decision against them which was not on the merits; and

(5) That defendants now unfairly seek to invoke that decision to deprive them, under the principles of *res judicata*, of the federal forum to which they are entitled for their $20,000,000 case based on 42 U.S.C. §1983.

If all of this were true, plaintiffs would have stated compelling reasons why this Court should deny defendants' Petition. None of these propositions is true, however. For the reasons set forth herein and in the Petition, the Petition should be granted to review and reverse the decision of the Court of Appeals.

I.

THE CASE INVOLVES A SUBSTANTIAL ISSUE OF FEDERAL LAW WHICH NEEDS TO BE DECIDED BY THIS COURT.

Plaintiffs misconstrue, intentionally or otherwise, the nature of the important federal question presented by this case. That question is not, as plaintiffs phrase it, whether *Marrese* is valid, nor is it "what preclusive effect a federal court should give to a final judgment rendered by a state court . . ." (Respondents' Brief at 10-11). Instead, this case presents the difficult, important federal question, which Chief Justice Burger predicted this Court would eventually face, of "how the District Court should proceed if it finds state law silent or indeterminate on the

claim preclusion question." 470 U.S. at 388. Since there is no Illinois case squarely on point,[1] state law here is unquestionably "silent or indeterminate" on this claim-splitting issue. How, then, should the District Court proceed?

Chief Justice Burger would, in a case such as this one, fashion and apply a federal *res judicata* and claim-splitting rule, reasoning that, in the absence of pertinent state court precedent, such a rule does not offend the principles of comity and federalism which underlie the Full Faith and Credit Statute, 28 U.S.C. §1738. 470 U.S. at 390.[2] Others suggest that the federal court should, as in a diversity case, sit as the state court and rule as it believes a state court *would* rule. Smith, *Full Faith and Credit and Section 1983: A Reappraisal*, 63 N.C.L. Rev. 59 (1984). *Cf.* Shreve, *Preclusion and Federal Choice of Law*, 64 Tex. L. Rev. 1209 (1986).

Chief Justice Burger's approach will better serve to protect the important federal interests of judicial economy inherent in established federal doctrines against claim-splitting, thus assuring plaintiffs the opportunity to litigate their asserted federal rights, while protecting defendants from harrassment by multiple suits. These doctrines should

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[1] Plaintiffs' suggestion at page 13 of their Brief, that there are "literally hundreds of applicable cases", is surely facetious, since they cite none, nor can they cite even one which addresses a factual situation like this one. Likewise, their argument that defendants would have federal courts supplant state law (Respondents' Brief at 13) is based upon the faulty premise that state law exists which can be supplanted, when there is, in fact, no such law here.

[2] As discussed in defendants' Petition, Chief Justice Burger would preclude a party from asserting a claim "that he had a 'full and fair opportunity' to litigate in a prior action . . . ." *Marrese*, 470 U.S. at 390.

be applied to §1983 claims, creatures of federal law, when state law provides no clear rule of decision for the federal courts to follow. However, either Chief Justice Burger's approach or the diversity approach is more reasonable than, and preferable to, the approach taken by the Court of Appeals here.

The Court of Appeal's approach effectively forecloses the *res judicata* defense in a federal case following a related state court decision in the absence of an applicable state court *res judicata* precedent directly on point. It is an utter distortion of the principles of comity and federalism to read such an absurd result into the Full Faith and Credit Statute. The lower federal courts will be unable to dismiss from their dockets claims which should have been asserted in previous state court proceedings because there is no clear state court precedent sanctioning such dismissal. Defendants' Petition for Writ of Certiorari should be granted, and this case reversed, thereby giving Federal District Judges the ability to prevent the kind of abusive claim-splitting and forum shopping found here.

II.

PLAINTIFFS' PARTICIPATION IN THE STATE COURT PROCEEDINGS WAS NEITHER UNWILLING NOR LIMITED.

Plaintiffs intervened in the *Corporate West* case on October 10, 1980, seeking preliminary and permanent injunctive relief from the August 13, 1980 state court order. Rather than press that claim, however, they did virtually nothing for nearly four years, and that claim was dismissed as moot on May 13, 1984, with leave to amend (App. A-6).[3] On June 11, 1984, plaintiffs filed their amended

[3] Appendices A-H are bound in Defendants' Petition. Appendices I-L are bound herewith.

complaint therein, based on 42 U.S.C. §1983, alleging that the August 13, 1980 order violated their constitutional rights (under the fifth and fourteenth amendments to the U.S. Constitution) to procedural and substantive due process, equal protection and against a taking of their property without just compensation and claiming damages in the amount of $20,000,000 (App. F). Plaintiffs' amended complaint thus initiated, for all practical purposes, a new and quite different case, in which they sought the same relief as they seek herein, and which they thereafter aggressively pressed at all levels of the Illinois judicial system.[4]

The state trial court, by opinion dated December 16, 1986, dismissed plaintiffs' amended complaint, expressly finding on the record before it that plaintiffs had caused their own injury, if any, and that such injury was not related to any conduct by the defendants (App. G-4-6). Plaintiffs then appealed that ruling to the Illinois Appellate Court, which, on December 11, 1987, affirmed the trial court's dismissal of plaintiffs' §1983 claims (App. I). On January 4, 1988, plaintiffs petitioned the Illinois Appellate Court for rehearing (App. J), which petition was denied on January 19, 1988 (App. K). Thereafter, plaintiffs petitioned the Illinois Supreme Court for leave to appeal, which petition was denied on June 3, 1988 (App. L). Contrary to plaintiffs' assertions, this eight-year litigation odyssey in the Illinois courts, most recently in pursuit of $20,000,000 in §1983 damages, cannot be accurately de-

[4] As pointed out below in Section IV at p. 8, at the time in 1984 that plaintiffs filed their state court amended complaint, asserting for the first time therein claims under §1983 and for money damages, they could have amended their federal antitrust case, then pending, and added such claims, just as they finally did in 1987. Nothing compelled them to proceed in two forums at that time or thereafter.

scribed as a limited or unwilling effort to obtain relief from the August 13, 1980 order.

III.

PLAINTIFFS WRONGLY ASSERT THAT THE *CORPORATE WEST* CASE WAS NOT DECIDED ON ITS MERITS.

The state court decision clearly was on the merits. The trial court found, on the basis of the pleadings and evidence before it, that plaintiffs were never prohibited from exercising their rights under the 1979 permit, that they were never injured in fact in their rights under the 1979 permit because they were never actually refused the right to connect, that the plaintiffs' 1979 permit expired by its own terms thus extinguishing any rights thereunder and that for the foregoing reasons, the plaintiffs were never injured in fact, by the defendants, no justiciable issue was presented, and the plaintiffs had no standing to bring the action (App. A-6-7). The Illinois Appellate Court's affirmance was based on findings that plaintiffs had no intention, during the two-year period in which plaintiffs' 1979 sewer permit was in force, of constructing the permitted and necessary on-site interceptors, and no intention of seeking (and to this day have never sought) the sewer connection permits they claimed they were denied. The court found that these actions were conscious business decisions taken by plaintiffs, by their own admission, in response to a slow housing market, and were the cause of injury, if any, to the plaintiffs. The court found that defendants were not the cause of such alleged injuries (App. I).

Against this record,[5] and given how emphatically plaintiffs argued to the contrary in state court, their assertion

[5] Judge Plunkett's discussion and conclusion hereon is found at App. D-9.

here that the state court proceedings were not decided on the merits is surprising. Here is how plaintiffs themselves described the state court's decision in their petition for rehearing to the Illinois Appellate Court:

> In the instant case, while both the Court and defendants have labeled the issue addressed as "standing", the Court's Rule 23 Order does not find that Unity lacks standing in the traditional sense of whether plaintiff has alleged a sufficient interest in the outcome of the case to ensure that plaintiff has a real interest in the case. . . . That is, the Court and defendants made no attempt to show that Unity's interest in this case was insubstantial or theoretical. Rather, defendants argued, and this Court found, that Unity's allegations regarding *the proximate cause* of its injuries were not supported by the *evidence*. Thus, while the Court employed the rhetoric of "standing", it in fact proceeded to consider the "ultimate fact" of Unity's case: the proximate cause of its injuries.

(App. J-4-5) (footnote omitted) (emphasis original). Plaintiffs' assertion now that the state court decision was not "on the merits" is plainly wrong.

IV.

FEDERAL DISTRICT JUDGES MUST BE PERMITTED TO APPLY FEDERAL LAW, IN THE ABSENCE OF DISPOSITIVE STATE PRECLUSION PRINCIPLES, TO PREVENT INTENTIONAL CLAIM-SPLITTING.

Sandwiched in between two, full scale (zoning, water, sewer) conspiracy complaints filed in federal court in 1982 (antitrust) and 1987 (§1983), plaintiffs in 1984 brought a §1983 case in state court against the same defendants with respect to the same real estate development on the same site with the same claimed damages. Their state court amended complaint asserted the same four constitutional claims as herein, but based them only on the sewer ele-

ment. Plaintiffs lost the state court case, on the grounds that plaintiffs' injury, if any, was self-inflicted, and not caused by defendants.

The first question which *must* be asked, in applying federal or Illinois *res judicata* (or claim-splitting) law in this case, is: could plaintiffs have brought all of their §1983 claims in state court when they filed their amended complaint there in June of 1984, alleging what they *now* contend are only *some* of their §1983 claims? The answer to that question is yes: plaintiffs knew about the full, alleged conspiracy at least as early as 1982 when they described it in their original, antitrust complaint herein. Moreover, they had no §1983 claims pending in any court in 1984.

The next question is: could plaintiffs have brought all of their §1983 claims in federal court in 1984? That answer is also yes. The state court had dismissed their original complaint in the *Corporate West* case as moot, not on the merits, in May, 1984. At that time, plaintiffs were free to select the forum—state or federal—in which to prosecute their §1983 damage claims. They should have chosen only one; they are not entitled to both. Having first chosen a state forum, they cannot now claim they are also entitled to a federal one.

Since plaintiffs could have brought *all* of their §1983 claims against defendants in either state or federal court in the spring of 1984, both Illinois and federal law required that they do so in a single proceeding. *Hagee v. City of Evanston*, 729 F.2d 510 (7th Cir. 1984); *Torres v. Rebarchak*, 814 F.2d 1219 (7th Cir. 1987). Instead, they chose to bring some of their known §1983 claims in state court in 1984 and all of those claims in federal court in 1987. This is intentional claim-splitting—pure and simple—and ought never be tolerated in federal court. Moreover, there is no case in which the Illinois courts have tolerated such pleading abuses.

V.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully urge the Court to issue the requested writ for the purposes of (1) directing federal courts to apply federal law in the circumstances described hereinabove and in the Petition, and (2) reversing the Court of Appeals' decision herein, as clearly required by federal and state law.

Respectfully submitted,

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Dated: March 6, 1989

APPENDIX

APPENDIX I

[This Order Is Not Precedential
And Not To Be Published]

No. 2-87-0043

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CORPORATE WEST DEVELOPMENT, INC., *Plaintiff,*

and

WILLIAM ALTER, SHELDON SIMBORG as Trustee of UNITY TRUST, JOSEPH ASH as Trustee of FAMILY UNITY TRUST, MILTON LEVENFELD as Trustee of DAVIS FAMILY TRUST, JOSEPH ASH as Trustee of RHONDA, MICHAEL, HARVEY, JONATHAN and JENNIFER TRUST, JOSEPH ASH as Trustee of R.L.A., M.J.A., H.L.A., J.B.A., and J.S.A. TRUST, PARTNERS IN A PARTNERSHIP NAMED UNITY VENTURES,

Intervening Plaintiffs-Appellants,

v.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, MICHAEL MAUZY, Director of Illinois Environmental Protection Agency, COUNTY OF DUPAGE, VILLAGE OF LISLE, and VILLAGE OF WOODRIDGE,

Defendants-Appellees.

Appeal from DuPage County, Illinois.
No. 79 MR 257
Honorable Anthony M. Peccarelli, Judge Presiding.

ORDER PURSUANT TO SUPREME COURT RULE 23

This appeal arises from an order entered by the trial court dismissing plaintiffs' complaint pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1985, ch. 110, par. 2-619). Plaintiffs sought equitable relief and compensatory damages from defendants for conduct alleged as having deprived them of obtaining sewage disposal service for property plaintiffs were in the process of developing. The trial court dismissed plaintiffs' complaint for lack of standing. We affirm.

As the parties are well acquainted with the facts of this case, we refer to them only as necessary for an understanding of our disposition.

Plaintiffs, individuals and partners in a partnership named Unity Ventures (Unity), are the owners of three parcels of property located directly west of the village of Lisle (Lisle) and the village of Woodridge (Woodridge) in unincorporated Du Page County (county). Unity obtained this property with the intention of creating a development known as "Hobson Greene." Unity intended to develop the property in three separate phases described as units one, two, and three.

Prior to beginning its development, Unity undertook arrangements to construct a sewage disposal system. The property was located in an area serviced by public sewer pipes (public interceptors) connected to the Lisle-Woodridge Sewage Treatment Plant (plant). In order to ensure that the plant had sufficient capacity available to treat the sewage generated by the development, Unity engaged in a four-step plan for construction. As described in Unity's brief, the four steps included: (1) obtaining a permit from the Illinois Environmental Protection Agency (IEPA) allowing Unity to construct and operate sewage lines or on-site interceptors on Unity's property; (2) actually constructing the on-site interceptors; (3) obtaining building and connection permits from the county allowing Unity to build the dwellings and connect the on-site intercep-

tors to those dwellings; and (4) actually constructing the dwellings and connecting them to the on-site interceptors.

On January 31, 1979, Unity was issued an IEPA permit to construct and operate the on-site interceptors for unit two of the development. The permit had an expiration date of January 31, 1981, and construction of the on-site interceptors was to be completed by that time. The permit further specified that unit two of the development would generate sewage at the rate of 239,200 gallons per day design average flow, or 2,392 population equivalents (P.E.). In other words, the permit allowed Unity to construct on-site interceptors sufficient to connect homes and apartments housing 2,392 people producing 239,200 gallons of sewage per day. The county had previously certified that the plant had sufficient capacity to service that amount of sewage.

On May 31, 1979, after Unity obtained permission to construct the on-site interceptors, but prior to any actual construction, the IEPA placed the plant on "restricted status." This action was taken based upon the IEPA's determination that the plant was operating dangerously close to or above capacity. In the wake of this action, Corporate West Development, Inc., filed the original complaint in this proceeding seeking the right to connect its completed development.

Following an extended period of negotiations, the parties entered into an agreement regarding the amount of P.E. for which connection permits to the plant could be issued. The county, Lisle, and Woodridge subsequently agreed to a formula for allocating the available P.E. among themselves. On August 13, 1980, the trial court entered an order in accordance with the parties' agreement (August 13 order). The August 13 order provided that connection permits could be issued for a total of 400 P.E., to be allocated among the villages and the county as follows: Lisle, 38%; Woodridge, 34%; and DuPage County, 28%. The August 13 order further provided that if certain improvements were made in the quality of treat-

ment provided by the plant, connection permits could be issued for additional P.E. on a gradual basis. Furthermore, the August 13 order stated:

> "The County, the Village of Lisle and the Village of Woodridge agree to issue only those permits which shall not cause additional loading to exceed the allocations as set forth [in this order]."

The August 13 order was to remain in effect until the plant had adequate capacity to "accept all outstanding permitted loading."

Unity was not a party to the action and did not receive notice of either the entry of the August 13 order or the negotiations preceding its entry. However, as of August 13, 1980, Unity had neither begun construction of the on-site interceptors, nor applied for connection and building permits. At this time, there were just over five months left on Unity's IEPA permit. Once Unity learned of the August 13 order, Unity interpreted it to render its IEPA permit worthless. Unity arrived at this conclusion on the basis that its IEPA permit allowed construction of on-site interceptors to accommodate P.E. in excess of the maximum amount the county, Lisle, and Woodridge were permitted to issue connection permits for under the August 13 order.

On October 10, 1980, the court entered an order allowing Unity to intervene. Unity filed its intervening complaint seeking, *inter alia*, an order vacating the August 13 order, a declaration of its rights regarding its permits, and a preliminary and permanent injunction enjoining the IEPA and county from refusing to issue further connection permits.

On October 9, 1980, Unity filed a petition for variance with the Illinois Pollution Control Board (IPCB) seeking to extend the two-year limitation of its IEPA permit. In its petition, Unity stated that it had not begun construction of the on-site interceptors because of (1) "the slow down in demand for residential housing"; and (2) "the un-

certainties surrounding the Lisle-Woodridge Sewage Treatment Plant." The petition further stated that even if the on-site interceptors were constructed in time, "[b]ecause of the slowdown in the real estate housing market, the sanitary sewer extension would in all probability lie unused for the immediate future." The IPCB dismissed Unity's petition finding that the petition "lacked a sufficient allegation of hardship." This court reversed in an order entered pursuant to Supreme Court Rule 23 (73 Ill. 2d R. 23), and remanded the case for hearing. On remand, the IPCB entered an order denying Unity's petition on the grounds that (1) the petition had expired as a result of an improper transfer; and (2) Unity had failed to prove that it would suffer an "arbitrary or unreasonable hardship" if the variance were not granted. This court affirmed the IPCB's decision. *Unity Ventures v. Pollution Control Board* (1985), 132 Ill. App. 3d 421, 435.

On January 31, 1981, while the variance proceeding was pending, Unity's IEPA permit expired on its own terms. As of that date, Unity had not begun construction on the on-site interceptors for unit two, nor had Unity requested connection or building permits from the county for that part of the development.

In the meantime, the county, Lisle, and Woodridge answered Unity's complaint in the instant case. These defendants admitted that the August 13 order had been entered without notice to Unity, and in response to Unity's allegations that the effect of the order was to bar Unity's use of the plant, stated that those allegations were "conclusions of the pleader" only. On February 2, 1981, the IEPA filed a motion to dismiss arguing, *inter alia*, that Unity had no standing to pursue this action. That motion was denied. In its subsequent answer the IEPA admitted that the August 13 order had been entered, but neither admitted nor denied Unity's allegation that the affect of the order was to bar Unity's use of the plant.

On January 3, 1983, the IEPA filed a second motion to dismiss arguing that Unity's claims were moot as a

result of the anticipated completion of a new sewage treatment plant (Greene Valley). Although holding that the case was not moot, the court noted that it might become moot.

On April 27, 1984, the IEPA moved to dismiss Unity's intervening complaint on the grounds of sovereign immunity and mootness. The IEPA's motion alleged that the connection limitations were no longer in effect as a result of the completion of the Greene Valley plant. On May 14, 1984, the trial court entered an order lifting the August 13 order.

On June 11, 1984, Unity filed its amended complaint seeking a declaration that its IEPA permit was in full force, an injunction prohibiting defendants from interfering with Unity's attempt to make connections, and damages. Defendants moved to dismiss Unity's amended complaint alleging, *inter alia*, that Unity lacked standing to bring its action. On August 8, 1985, the court dismissed Unity's amended complaint without prejudice based upon its conclusions that there were no equitable issues and that the case properly belonged in the law division. The court subsequently granted Unity's motion to vacate or amend the order of August 8, 1985, and Unity was given leave to file an amendment striking its requests for injunctive relief. The case was subsequently transferred to the law division.

On November 26, 1985, defendants moved to dismiss Unity's amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Ill. Rev. Stat. 1985, ch. 110, par. 2-619). The grounds asserted for dismissal were that (1) Unity did not have standing to sue since it allowed the permit to expire on its own terms; (2) the cause of action was barred by final judgments in collateral proceedings; and (3) the action had not been brought within the time limited by law. The IEPA was voluntarily dismissed prior to a decision on this motion.

On November 19, 1986, the trial court issued a letter opinion to counsel on defendants' motion to dismiss stating in pertinent part:

"It is clear from the pleadings, motions and documents submitted in this cause that Unity was never prohibited from exercising its rights under the 1979 permit to connect to the Lisle and Woodridge Plant. During the existence of the permit, Unity neither obtained a judicial or administrative judgment as to the status of the 1979 permit nor attempted to actually connect its sanitary system to the Lisle and Woodridge plant.

* * *

Unity was never injured in fact in its rights under the 1979 permit because Unity was never actually refused the right to connect. In fact, during the existence of the permit, the structural work necessary to connect with the Lisle and Woodridge Plant had not even been started.

The 1979 permit expired on its own terms on January 31, 1981 extinguishing Unity's rights thereunder.

Unity was never injured in fact, no longer has rights in the 1979 permit which could presently be exercised, no justiciable issue [*sic*] and has no standing to bring this action.

The issue of standing being dispositive there is no reason to consider other arguments in support of the Motion to Dismiss.

The Motion to Dismiss under § 2-619 of the Illinois Code of Civil Procedure is granted."

On December 16, 1986, the trial court entered an order in accordance with its letter opinion. Unity has filed this timely appeal.

At issue on appeal is whether the trial court improperly granted defendants' section 2-619 motion to dismiss on the grounds that Unity lacked standing since any injury it suffered was self-inflicted. Unity first challenges the posture in which the court reached its decision arguing that defendants' motion challenging Unity's standing does nothing more that "improperly offer evidence to refute a well pleaded fact." We disagree.

Section 2-619(a)(9) provides in pertinent part:

> "Involuntary dismissal based upon certain defects or defenses.
>
> (a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:
>
> * * *
>
> (9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." (Ill. Rev. Stat. 1985, ch. 110, par. 2-619(a)(9).)

The alleged affirmative matter asserted under a section 2-619(a)(9) motion must be something more than evidence offered to refute a well-pleaded fact since all well-pleaded facts are to be taken as true. See *First National Bank v. Minke* (1981), 99 Ill. App. 3d 10, 13.

While it is true that in construing a motion to dismiss all well-pleaded facts in the plaintiff's complaint are to be taken as true, this presumption does not apply to conclusions of fact or law. (*Stiefel v. Illinois Union Insurance Co.* (1983), 116 Ill. App. 3d 352, 355-56.) In *Stiefel*, the plaintiff's "allegation that he 'reasonably believed' any possible claim had been forsaken and abandoned" was held to be a conclusion, and, therefore, was not admitted as true in a motion on the pleadings. 116 Ill. App. 3d at 356.

In the instant action, Unity alleges that (1) the August 13 order "had the effect of extinguishing Unity's rights under its January 31, 1979 permit and had the effect of preventing Unity's lawful development of Hobson Greene"; (2) "[a]s a result of the August 13, 1980 order, Unity has been unable to begin construction of the sewer lines and facilities for Unit Two, and thus has been unable to proceed with the second phrase [*sic*] of the Hobson Greene development"; and (3) "[a]s a result of its inability to begin

said construction, Unity's January 31, 1979 permit expired on January 31, 1981." We believe these allegations regarding the legal effect of the August 13 order constitute conclusions rather than well-pleaded facts, and should not be taken as true for the purposes of a section 2-619 motion.

Unity's conclusions purport to establish its "injury" and basis for standing on this claim. This court has held that a showing of plaintiff's lack of standing may be a basis for dismissal pursuant to section 48(1)(i) of the Civil Practice Act (now section 2-619(a)(9) of the Code of Civil Procedure). (*Hermes v. Wm. F. Meyer Co.* (1978), 65 Ill. App. 3d 745, 747. See also *In re Marriage of Musa* (1982), 103 Ill. App. 3d 189, 191; *Smith v. St. Therese Hospital* (1980), 87 Ill. App. 3d 782, 784-85.) Accordingly, we believe that the trial court did not err in entertaining a motion to dismiss on these grounds.

We are left to determine whether the trial court correctly found that Unity lacked standing in the instant action. The basis for the trial court's finding in this regard was that "Unity was never injured in fact in its rights under the 1979 permit because Unity was never actually refused the right to connect." The court further noted that "during the entire existence of the permit, the structural work necessary to connect with the [plant] had not even been started." Thus, the question becomes whether Unity's inaction was fatal to its standing. The trial court correctly held that it was.

Essentially, Unity argues that defendants' agreement, culminating in the August 13 order, placed a limitation on the number of connection permits that could be issued at a level lower than the number needed by Unity to connect all of the structures it intended for unit two of its development. Unity contends that the August 13 order effectively barred Unity from developing its property to the potential to which it was entitled under the IEPA construction and operation permit. Citing our decision in *Village of Lake in the Hills v. Laidlaw Waste Systems, Inc.* (1986), 143 Ill. App. 3d 285, Unity asserts that its

inability to develop its property to its fullest potential and the costs associated with the delays caused by defendants' agreement are precisely the types of direct injury to its property and rights which are required to establish standing. We disagree.

In *Village of Lake in the Hills*, we held, after noting that a plaintiff must allege a direct injury to his property or rights, that the village did not have standing to challenge a proposed landfill site since it did not own the property on which the site was to be located, nor did it allege or prove any special damages it might suffer to its property interests. (143 Ill. App. 3d at 294.) We note that in the instant case, Unity has alleged that defendants' conduct has damaged property owned by Unity. However, the constitutional test for standing focuses on whether a plaintiff has suffered some actual or threatened injury that can fairly be traced to the challenged action of the defendant. (*Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.* (1982), 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed. 2d 700, ____; *Wade v. Dole* (N.D. Ill. 1986), 631 F. Supp. 1100, 1105. See also *People v. Lee* (1981), 99 Ill. App. 3d 630, 635.) In order to satisfy the jurisdictional prerequisite of standing, the plaintiff must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged conduct, and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical. *Palmer v. City of Chicago* (N.D. Ill. 1985), 755 F.2d 560, 570.

We do not believe that Unity's "inability" to develop its property is either traceable to defendants' actions or real and immediate enough to confer Unity standing in this case. The record indicates that it was Unity's conduct, rather than defendants, that was responsible for Unity's failure to develop its property.

We note that Unity obtained its IEPA permit allowing it to construct on-site interceptors for its property on January 31, 1979. The plant was not placed on restricted

status until four months later. Yet, at the time the plant was placed on restricted status, Unity had not begun construction on the on-site interceptors. In addition, defendants' challenged conduct did not occur until more than 18 months had elapsed on Unity's IEPA permit. Yet, despite the IEPA permit's approaching expiration date, Unity had not begun construction on the on-site interceptors. The record clearly indicates that Unity's inaction was a conscious business decision in response to a slow housing market. In its petition for variance filed with the IPCB on October 9, 1980, just over 20 months after the issuance of the IEPA permit, Unity sought an extension of the two-year limitation stating that it had not begun construction due to the substantial decrease in the demand for housing and the uncertainties regarding the status of the plant. In fact, the petition further stated that even if Unity was able to utilize "extreme measures" to complete the on-site interceptors in time, "*[b]ecause of the slowdown in the real estate housing market* the sanitary sewer extension would in all probability lie unused for the immediate future." (Emphasis added.)

From these facts it is apparent that (1) Unity had no intention of constructing the on-site interceptors prior to the expiration of its IEPA permit; and (2) even if Unity had been able to construct the on-site interceptors within the time remaining on its IEPA permit, it had no intention of seeking the connection permits which it claims it was denied. Such concessions have been found to preclude a finding of standing on the basis that the alleged injury is merely conjectural. (See *Friedrich v. City of Chicago* (N.D. Ill. 1985), 619 F. Supp. 1129, 1146-47 (street performers challenging a city ordinance banning performances at certain times and in certain areas did not suffer a direct and real injury and did not have standing since they acknowledged that none of the performers "has performed or desires to perform" in the areas and at the times banned).) The record demonstrates that Unity did not suffer any adverse effects as a result of *defendants'* conduct. Absent such a showing, Unity does not have standing to challenge

defendants' conduct. See *222 East Chestnut Street Corp. v. Board of Appeals* (1956), 10 Ill. 2d 132, 136.

Moreover, the record indicates that Unity in fact never sought and was, therefore, never refused the building and connection permits which it has alleged it was denied. Thus, it is apparent from the record that any "injury" Unity suffered as a result of defendants' agreement to limit the issuance of connection permits is merely hypothetical. See *Rathe v. Stamper* (1966), 75 Ill. App. 2d 265, 270 (plaintiff did not have standing to challenge a statute setting forth examination requirements for licensing funeral directors since plaintiff failed to allege that he sought a license or was otherwise engaged in conduct for which a license was required). See also *Brown v. McGarr* (N.D. Ill. 1984), 583 F. Supp. 734, 736 (attorney who was otherwise not eligible for admission to the Federal bar lacked standing to challenge the legality of the application fee requirement since he could not show injury to himself as a result of that requirement's imposition).

Unity's failure to begin construction on the on-site interceptors for more than a year and one-half *before* defendants' challenged conduct and the reasons stated for this delay in Unity's petition for variance support the trial court's decision that it was not defendants' conduct which caused Unity's "injury," but rather Unity's own inaction. Having failed to show a direct injury which is fairly traceable to defendants' challenged conduct, we conclude that Unity lacked standing to maintain this action.

In reaching this decision we are mindful of Unity's argument that requiring it to have built the on-site interceptors or apply for connection permits in order to have standing would be improper since these would be "worthless acts" which are not required by law. Unity correctly states that the law does not require the performance of a useless act. (*Moehling v. Pierce* (1954), 3 Ill. 2d 418, 423; *Rock Island YWCA v. Bestor* (1977), 48 Ill. App. 3d 761, 765.) Unity states that "under the agreed order, Unity's rights were far from certain." Unity later states

that "the August 13 agreed order absolutely barred Unity from constructing any homes in its development and from connecting any home in its development to those on-site interceptors." Unity concludes that "[f]aced with these absolute bars to proceeding with its development, it would have been a complete and utter waste of money for Unity to have constructed interceptors which it could not use." However, Unity's conclusion that the performance of these acts would have been useless is not supported by the record.

The agreed order in controversy was entered in a case in which Unity was not a party. We note that Unity cites our supreme court's decision in *North Shore Sanitary District v. Pollution Control Board* (1976), 62 Ill. 2d 385, 391, wherein the court stated that the right of permit holders to connect their developments to the district's sewage facilities could not be abridged by subsequent limitations without those permit holders being given notice and an opportunity to be heard. However, our analysis of *North Shore Sanitary District* indicates that the permit holders in that case held previously issued "connection permits" rather than the construction permit held by Unity in the instant action. 62 Ill. 2d at 390.

Furthermore, Unity's IEPA permit merely gave it the right to construct the on-site interceptors. The IEPA permit, although issued on the county's certification that the plant could handle the sewage that would be produced by Hobson Greene, does not give Unity an absolute entitlement to connection or building permits issued by the county. Moreover, Unity's useless act argument is particularly without merit in light of the fact that Unity took no steps to construct the on-site interceptors *prior* to defendants' challenged conduct and affirmatively stated that were it to do so, the on-site interceptors would in all probability not be used. In any case, Unity never sought and was never refused any connection permits.

Therefore, we find that the record adequately supports the trial court's finding that it was Unity's inaction, rather

than defendants' conduct that caused Unity's injury. Absent a real injury traceable to defendants, the trial court correctly held that Unity lacked standing.

Accordingly, we affirm the decision of the trial court dismissing Unity's complaint for lack of standing.

Affirmed.

INGLIS, J., LINDBERG, P.J., REINHARD, J.

APPENDIX J

[Cover, Table of Contents, and
Table of Authorities omitted in printing]

No. 87-43

APPEAL TO THE
APPELLATE COURT OF THE STATE OF ILLINOIS
SECOND JUDICIAL DISTRICT

CORPORATE WEST DEVELOPMENT, INC.,
Plaintiff,

and

WILLIAM ALTER, et al.,
Intervening Plaintiffs-Appellants,

vs.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants-Appellees.

No. 79 MR 257
The Honorable Anthony M. Peccarelli, Judge Presiding

INTERVENING PLAINTIFFS' PETITION FOR REHEARING

Pursuant to Illinois Supreme Court Rule 367, intervening plaintiffs Unity Ventures, et al., ["Unity"] petition this Court for rehearing and reconsideration of its Order entered December 11, 1987. In support of its petition, Unity states as follows.

SUMMARY OF POINTS MISCONSTRUED BY THE COURT WHICH WARRANT RECONSIDERATION

Unity submits that this Court's Rule 23 Order entered on December 11, 1987 improperly expands the scope of Rule 2-619 by resolving contested issues of fact at the pleading stage and without providing Unity with notice that these factual disputes would be considered, thereby depriving Unity of an opportunity to submit evidence in opposition to the "facts" which this Court found uncontested. In particular, one of the central issues in this case is that of proximate cause: Did Unity voluntarily abandon its proposed Hobson Greene development or was Unity's failure to proceed with its development proximately caused by defendants' wrongful acts leading to entry of the August 13, 1980 *ex parte* Agreed Injunction Order? Unity submits that this is a classic question of proximate cause—an issue which cannot be resolved on a Section 2-619 motion but must be decided by the jury at trial.

In Section I below, Unity discusses the proper scope of a Section 2-619 motion. In Section II below, Unity discusses the facts in the record which, assuming *arguendo* that the Court can properly reach the issue of proximate cause on a Section 2-619 motion, demonstrate that the Court wrongly concluded that Unity's injury was not proximately caused by defendants' wrongful conduct.

I.

THE COURT'S ORDER IMPROPERLY RESOLVED DISPUTED FACTUAL ISSUES REGARDING THE PROXIMATE CAUSE OF UNITY'S INJURIES

The Court properly sets out the limitations inherent in a Section 2-619 motion (Order at 11):

> The alleged affirmative matter asserted under a section 2-619(a)(9) motion must be something more than evidence offered to refute a well-pleaded fact since all well-pleaded facts are to be taken as true.

However, in the remainder of the opinion, the Court seems to abandon this limitation on the scope of a Section 2-619(a) motion and in fact proceeds to consider the facts central to plaintiffs' case-in-chief—what was the proximate cause of Unity's failure to proceed with its development—rather than any "affirmative matter" which would be the proper subject of a Section 2-619 motion.

The very cases cited by the Court in its Rule 23 Order demonstrate the impropriety of resolving this type of proximate cause issue in a Section 2-619 motion. For example, in *Smith v. St. Therese Hospital*, 87 Ill.App.3d 782, 410 N.E.2d 219 (2nd Dist. 1980), this Court specifically rejected use of a Section 2-619 motion as a means of resolving a dispute over the proximate cause of plaintiff's injuries. In *Smith*, plaintiff alleged that she had been injured by an adverse reaction to a drug she had been administered while hospitalized. She named as defendants her doctor, the hospital, and a number of companies which manufactured the drug in question, although plaintiff *admitted* that she did not know which company manufactured the dose of the drug which caused her injury.

Following limited discovery, one of the manufacturers moved for judgment pursuant to Section 2-619 relying upon plaintiff's answers to interrogatories in which she tentatively identified another company's product as the drug which *might* have been given to her. Based upon this limited evidence, the moving defendant in *Smith*, like defendant in the instant case, argued that it was not the proximate cause of plaintiff's injuries.

The Court rejected defendants' argument. The Court first set forth the proper scope of a Section 2-619 motion (410 N.E.2d at 222):

> [T]he main purpose of section [2-619] is to provide a means of disposing of issues of law or of easily proved issues of fact. * * * If it cannot with reasonable certainty be determined from the record then before the court that the alleged defense exists, the motion should not be allowed on that ground. Where the

> matter alleged in defense is nothing more than evidence upon which a defendant expects to contest a material fact stated in the complaint, to dismiss under section [2-619] is improper.

The Court then held that defendant's motion in *Smith* improperly sought to resolve one of the central issues in the case: which company had manufactured the particular drug involved (410 N.E.2d at 222):

> [Defendant's] motion does not raise an affirmative defense, but merely seeks to controvert the allegations of the ultimate fact against this defendant made in plaintiff's complaint.

The other cases cited by the Court in its Rule 23 Order similarly distinguish between affirmative defenses (which are properly raised in a Section 2-619 motion) and motions which merely seek to disprove one or more elements of plaintiff's cause of action (*e.g.*, duty, breach of duty, proximate cause, injury, etc.) which are not proper subjects for a Section 2-619 motion. See, for example, *Davis v. Weiskopf*, 108 Ill.App.3d 505, 439 N.E.2d 60, 63 (2nd Dist. 1982) ("Defendant's motion and affidavit, however, did not admit the facts as stated in the complaint, but, instead, challenged them offering his contrary version * * * ") and *Michigan Avenue National Bank v. State Farm Insurance Companies*, 83 Ill.App.3d 507, 404 N.E.2d 426, 430 (1st Dist. 1980) ("[D]efendants' contention * * * does not raise an affirmative defense but simply goes to negate substantial allegations of ultimate fact in the complaint and this is not the proper purpose of a section [2-619] motion").

In the instant case, while both the Court and defendants have labeled the issue addressed as "standing", the Court's Rule 23 Order does not find that Unity lacks standing in the traditional sense of whether plaintiff has alleged a sufficient interest in the outcome of the case to ensure that plaintiff has a real interest in the case. The traditional "standing" test is set forth in *Valley Forge Christian College v. American United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (cited by the Court

in its Rule 23 Order at 14), in which the Supreme Court held that plaintiffs which challenged transfer of public land to a religious institution had not alleged any injury different from the injury suffered by the population at large:

> The federal courts have abjured appeals to their authority which would convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders.

In this case, Unity clearly alleged that it intended to develop its property but was stopped from doing so by entry of the August 13, 1980 *ex parte* Agreed Injunction Order. This allegation clearly sets Unity apart from the general public and alleges precisely the sort of individualized harm the Supreme Court found lacking in *Valley Forge*. Unity is clearly much more than a "concerned bystander" in this dispute.

Neither this Court nor the defendants argued that Unity lacked standing in this sense of not having alleged an individualized injury to set it apart from other "concerned bystanders". That is, the Court and defendants made no attempt to show that Unity's interest in this case was insubstantial or theoretical.* Rather, defendants argued, and this Court found, that Unity's allegations regarding *the proximate cause* of its injuries were not supported by the *evidence*. Thus, while the Court employed the rhetoric of "standing", it in fact proceeded to consider the "ultimate fact" of Unity's case: the proximate cause of its injuries.

As this Court clearly set forth in *Smith v. St. Therese Hospital*, 87 Ill.App.3d 782, 410 N.E.2d 219, 222 (2nd Dist. 1980), discussed at length above, proof of proximate cause forms part of plaintiff's cause of action; it is one of the

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* The seven years and countless dollars Unity has devoted to its attempt to undo the damage imposed upon it by the August 13 *ex parte* Agreed Injunction Order belie any argument that Unity has no real interest in this case.

elements plaintiff must prove in its case in chief. Proximate cause is thus *not* an affirmative defense and this is *not* a proper subject of a Section 2-619 motion.

This Court should not be confused by defendants' attempt to invoke the magic label of "standing" and must recognize that defendants really seek to disprove one of the elements of Unity's case: proof that Unity was injured as a result of defendants' illicit entry of the August 13 *ex parte* Agreed Injunction Order. This Court must not permit defendants to use a Section 2-619 motion as a substitute for trial by improperly labeling the issue "standing" rather than "proximate cause".

II.

ASSUMING *ARGUENDO* THAT THE COURT CAN PROPERLY REACH THE ISSUE OF PROXIMATE CAUSE, THE COURT MISCONSTRUED THE EVIDENCE OF RECORD

Unity emphasizes that defendants did not support their Section 2-619 motion with a single affidavit, deposition, discovery response, or any other piece of affirmative evidence. Rather, this Court relied *solely* on what plaintiffs' respectfully submit is at best an ambiguous statement in an application plaintiffs filed in an unrelated administrative proceeding to defeat the clear allegations of proximate cause set forth in plaintiffs' complaint. Plaintiffs submit that this ambiguous statement simply does not prove that defendants' illicit conspiracy to obtain entry of the August 13, 1980 *ex parte* Agreed Injunction Order did not cause plaintiffs' injuries.

Based solely on this statement, the Court concluded, without a hearing, without reviewing a single deposition, affidavit, or any other piece of evidence, that, as a matter of law, defendants' wrongful conduct did not play any part in stopping Unity from proceeding with its development. On October 9, 1980, Unity filed a petition with the IEPA seeking an extension of its permit which was due to expire in 1981. In its application, Unity stated:

> In summary, because of the slowdown in demand for residential housing *and* the uncertainties surrounding the Lisle-Woodridge Sewage Treatment Plant, Unity has not preceeded to construct the sanitary sewer extension necessary to provide sanitary sewer service for Hobson Green Unit 2. (emphasis added)*

The Court's use of this statement is not supported by the law or the facts.

A.

The Court's Reliance On The Allegedly Conclusory Nature Of Plaintiffs' Allegations Of Proximate Cause Is Misplaced

The Court begins its analysis of this statement (Order at 11) by properly recognizing that a Section 2-619 motion may not be used to refute the well-pleaded allegations of the complaint. The Court then avoids this rule by labeling as "conclusory" plaintiffs' allegations of proximate cause. The Court then holds that a Section 2-619 motion *can* be used to contest factual "conclusions". Plaintiffs respectfully submit that the Court is wrong in both steps of its argument: plaintiffs' allegations are *not* overly "conclusory" and, even if the allegations were conclusory, they can *not* be attacked in a Section 2-619 motion.

1. Plaintiffs' Allegations Of Proximate Cause Are Not Overly Conclusory

The Illinois Supreme Court recently condemned the belabored attempts of defendants and the lower courts to label allegations as conclusions, facts, or evidence, stating

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* This Court did *not* find, as defendants had urged, that the decision in these administrative proceedings was *res judicata* as to the instant action. As was discussed in plaintiffs' opening brief (pp. 36-39) the administrative proceedings were not "for the same cause" as the instant case and thus can have no preclusive effect in this case.

in *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill.2d 300, 430 N.E.2d 1005, 1008 (1982):

> Pleadings are not intended to erect barriers to a trial on the merits but instead to remove them and facilitate trial * * *. Perhaps the best measure of a complaint's sufficiency, then, is whether the defendant is able to answer the essential allegations.

The Court then discussed the particular allegations at issue in *Carriage Way West.* The complaint, which alleged that defendants had conspired to fix prices in violation of the antitrust laws, did *not* list the dates on which particular defendants joined the price-fixing conspiracy, did *not* describe the particular actions by which each defendant joined the conspiracy, and did *not* identify the agents through which the corporate defendants acted. Nonetheless, the court held that the complaint was not overly conclusory (430 N.E.2d at 1009):

> The defendants claim that the complaint does not describe any specific act which evidenced the entry of any particular defendant into the conspiracy. But evidence need not be laid out in the complaint, *only the ultimate fact* that the defendants agreed to fix prices. The trial, not the pleadings, is the proper place to look for evidence of how and when the illegal agreement was made. * * * Such specifics as when, where, or through what agency defendants came to agree were not required in the complaint. (emphasis added)

The complaint in the instant case goes far beyond alleging the type of "ultimate facts" of proximate cause which *Carriage Way West* held were sufficient to properly state a claim. Instead, Unity set forth in detail its attempt to develop its property, described the entry of the August 13, 1980 *ex parte* Agreed Injunction Order (and attached a copy of the Agreed Order to the complaint), and described with specificity the effect the Agreed Order had on Unity's attempt to proceed with its development. These detailed allegations more than satisfy the Illinois Supreme Court's minimal requirement, set forth in *Car-*

riage Way West, that a plaintiff need only allege "ultimate facts".

2. Defendants Improperly Sought To Disprove The Ultimate Fact Of Proximate Cause In A Section 2-619 Motion

Even assuming that plaintiffs had alleged no more than the "ultimate fact" that their injuries were caused by defendants' illicit entry of the August 13, 1980 *ex parte* Agreed Injunction Order, the very cases relied on by this Court in its Rule 23 Order demonstrate that defendants may not challenge even "ultimate facts" in a Section 2-619 motion. For example, in both *Smith v. St. Therese Hospital*, 87 Ill.App.3d 782, 410 N.E.2d 219, 222 (2nd Dist. 1980) and *Michigan Avenue National Bank v. State Farm Insurance Companies*, 83 Ill.App.3d 507, 404 N.E.2d 426, 430 (1st Dist. 1980), discussed in Section I above, the court specifically held that it is improper to seek to disprove allegations of "ultimate fact" in a Section 2-619 motion.

Plaintiffs respectfully submit that the propriety of a Section 2-619 motion is not judged by looking at the specificity of the factual allegations at issue; rather, the motion is proper if it raises *affirmative* matters and improper if it seeks to disprove some element of plaintiffs' case. This Court's opinion improperly addresses the issue of proximate cause—clearly *not* an affirmative matter but rather a central element in plaintiffs' case in chief.

B.

The Ambiguity Of The Evidence Relied On By This Court Forecloses Resolution Of The Issue Of Proximate Cause In A Section 2-619 Motion

This Court's opinion is based *exclusively* on the statements contained in Unity's petition for an extension of its permit. That petition, as the Court's opinion recognizes, identified *two* causes of Unity's failure to construct on-site interceptor for Unit Two *prior to* October, 1980:

(1) the August 13, 1980 *ex parte* Agreed Injunction Order and the events which preceded its entry *and* (2) the downturn in the economy.

Based on the proceedings in the trial court, Unity had no way of predicting the central role this petition would come to play. Defendants' brief in support of their motion did not cite this alleged "admission" (see def. br. at 9-10). Defendants offered no affidavit or other evidence which would support this Court's interpretation of Unity's petition. The trial court itself completely ignored this alleged "admission". Even defendants' brief *in this Court* failed to raise this argument.

Because of the failure of the defendants *or* the trial court to raise this issue, Unity was deprived of the opportunity to submit affidavits or other evidence to explain the obvious ambiguity in its petition. In contrast, in *every* case cited by this Court in its opinion—including those cases such as *Smith v. St. Therese Hospital*, 87 Ill.App. 3d 782, 410 N.E.2d 219, 222 (2nd Dist. 1980) in which the court concluded that defendant's Section 2-619 motion had been improperly granted, the trial court had considered affidavits, counter-affidavits, discovery responses, depositions, and, in some cases, had even held an evidentiary hearing. In this case Unity was completely deprived of an opportunity to make this type of record.

However, even if one sets aside the procedural unfairness, the statement included in Unity's petition for an extension of its permit simply cannot be read to support a finding of fact that defendants' illicit conduct played *no* part in causing Unity's injuries.

First, the petition *only* applied to Unit *Two* of Unity's proposed development. The complaint, in addition to its allegations of injury relating to Unit Two, *also* alleges that Unity was unable to obtain a permit for Unit *Three* as a result of the absolure bar imposed by the August 13, 1980 *ex parte* Agreed Injunction Order to the issuance of any further permits. Unity's petition is completely silent as to Unit Three and thus cannot be used to refute the specific allegations of harm set forth in the complaint.

Second, Unity's petition primarily focused on why Unity had not began construction prior to October, 1980. Obviously, the economy played some role in this delay, as the illicit Agreed Order had not been entered until August, 1980. However, nothing in the petition indicates that *but for* the entry of the August 13, 1980 *ex parte* Agreed Injunction Order Unity would have voluntarily let its permit lapse by not completing construction of the on-site interceptors *after* October, 1980.

Finally, even as to the period *before* October, 1980, Unity's petition clearly does *not* admit that defendants' actions played *no* part in Unity's failure to proceed. At best, Unity's petition states that there were *two* causes for its failure to proceed: the depressed economy *and* defendants' wrongful conduct. In other words, the petition clearly identifies defendants' wrongful conduct as *one* of the causes of Unity's failure to proceed. The fact that Unity's injuries may have, *in part*, resulted from Unity's own actions does not bar Unity's claim in its entirety. Illinois has rejected contributory negligence as an absolute bar and has adopted the comparative fault rule. *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886 (1981). Therefore, even if it were established that Unity was partially responsible for its own injuries (which Unity denies), it would be for the jury to decide what *portion* of Unity's injuries were self-inflicted and what portion were causes by the August 13, 1980 *ex parte* Agreed Injunction Order.

In sum, the ambiguous statements contained in Unity's petition simply do not constitute the quantum of "clear proof" that is needed to establish on a Section 2-619 motion that defendants' illicit conduct played *no* part in causing Unity's injuries.

CONCLUSION

Plaintiffs respectfully submit that this Court was misled by defendants' characterization of their motion as attacking Unity's "standing" and, as a result of this confusion,

this Court improperly resolved the central factual issue in this case—the issue of proximate cause—in a Section 2-619 motion to dismiss. Alternatively, this Court improperly deprived Unity of an opportunity to develop the record and, as a result, misinterpreted the statements in Unity's administrative petition.

Unity has bitterly contested this case for over seven years. It would be highly inequitable to dismiss Unity's claims based on a superficial analysis of difficult and complex issues which improperly led this Court's to find, in a Rule 23 Order, that Unity had no real interest in this case. Unity respectfully requests that the December 11, 1987 Rule 23 Order be vacated, that the trial court's judgment be reversed, and that this cause returned to the trial court for a hearing on the merits.

Respectfully submitted,

/s/ ALAN MILLS
One of the attorneys for
intervening plaintiffs-appellants

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APPENDIX K

(Letterhead Of)

State of Illinois
Appellate Court Second District
Elgin
60120

OFFICE OF THE CLERK
312-695-3750

Appeal from the Circuit Court of County of DuPage

Trial Court Number: 79MR257

THE COURT HAS THIS DAY, 01/19/88, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-87-0043

Corporate West Development, etc. v. Ill. EPA, etc.

Petition for Rehearing by Intervening Plaintiffs-Appellants is denied.
(Inglis, Lindberg, Reinhard, JJJ.)

LOREN J. STROTZ, Clerk

cc: James P. Chapman & Associates, Ltd.
Alan Mills
James P. Chapman, Esq.
Martin, Craig, Chester & Sonnenschein
Richard J. Kissel
Thomas B. Cassidy
Honorable Neil F. Hartigan
Michael J. Hayes
James Anthony Coghlan
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James H. Ryan, Esq.
William C. Ives
Honorable James E. Ryan
Gretta Tameling, Asst. State's Atty.

pa

APPENDIX L

STATE OF ILLINOIS
SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of May, 1988.

Present: Thomas J. Moran, Chief Justice

Justice Daniel P. Ward	Justice Howard C. Ryan
Justice William G. Clark	Justice Ben Miller
Justice Joseph F. Cunningham	Justice John J. Stamos

On the third day of June, 1988, the Supreme Court entered the following judgment:

No. 66546

Corporate West Development, Inc.,

William Alter, Sheldon Simborg as Trustee of Unity Trust, Joseph Ash as Trustee of Family Unity Trust, Milton Levenfeld as Trustee of Davis Family Trust, Joseph Ash as Trustee of Rhonda, Michael, Harvey, Jonathan and Jennifer Trust, Joseph Ash Trustee of R.L.A., M.J.A., H.L.A., J.B.A., and J.S.A., Trust, partners in a partnership named Unity Ventures,

Petitioners

v.

Illinois Environmental Protection Agency, Michael Mauzy, Director of Illinois Environmental Protection Agency, County of DuPage, Village of Lisle, and Village of Woodridge,

Respondents

Petition for Leave to Appeal from Appellate Court
Second District — 2-87-0043 — 79MR257

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-seventh day of June, 1988.

/s/ JULEANN HORNYAK, Clerk
Supreme Court of the State of Illinois